No. 85-138

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IN THE

Supreme Court of the United States

October Term, 1984

ROBERT ABRAMS,
Attorney General of the State of New York,
Petitioner,

against

MICHAEL ROMAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether the Sixth and Fourteenth Amendments to the Constitution authorize a Federal court to vacate a state criminal judgment of conviction, pursuant to 28 U.S.C. § 2254, solely upon allegations that the state prosecutor exercised his peremptory challenges to excuse whites from the trial jury where the trial jury which rendered the conviction consisted of three whites, three hispanics, and six blacks.

TABLE OF CONTENTS

	PAGE
Question Presented	1
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
The State Court Proceedings	4
The Jury Selection	5
The Conviction and Appeal	5
The Federal Court Proceedings	6
Reasons for Granting the Writ	7
Point—The Writ of Certiorari before judgment should issue to review whether allegations of prosecutorial discrimination against whites warrant federal habeas review under the Sixth and Fourteenth Amendments in a case in which three whites served as jurors because: (1) this term, the Court will consider an analogous claim regarding discrimination against blacks in a case arising on direct appeal from a State Court; (2) it also has pending before it a petition for certiorari from the only federal appellate decision holding that such allegations may support federal vacatur of a state conviction; and (3) review in this case would give the Court the opportunity to define the proper scope of federal review of such allegations at the same time that it decides the Question Presented in the Direct Appeal from the State Court	7
Conclusion	18

PAGE

Appendix:

A. Opinion of the United States District Court for the Southern District of New York (Bricant, J.) 1a

B. Order of Affirmance on Appeal from Judgment, New York State Supreme Court, Appellate Division 36a

C. Certificate Denying Leave, New York Court of Appeals 38a

D. Memorandum Decision, United States District Court for the Southern District of New York (Goettel, J.) 39a

E. Endorsement, United States District Court for the Southern District of New York (Goettel, J.) 45a

F. Petition for Writ of Habeas Corpus 47a

G. Transcript, Jury Selection, New York State Supreme Court, County of Bronx 52a

H. Transcript, Habeas Hearing, United States District Court for the Southern District of New York 56a

TABLE OF AUTHORITIES

PAGE

Cases:

Abrams v. McCray, No. 84-1426, *Petition for Cert.* filed March 4, 1985, 53 U.S.L.J. 3671 ... 8, 9, 12, 14
Aldridge v. United States, 283 U.S. 308 (1931) ... 13

Batson v. Kentucky, No. 84-6263, *Cert. granted* April 22, 1985 ... 8, 9

Castaneda v. Partida, 430 U.S. 482 (1977) ... 17

Dred Scott v. Sanford, 19 How. 393, 60 U.S. 393 (1857) ... 10
Duncan v. Louisiana, 391 U.S. 145 (1968) ... 10

Ham v. South Carolina, 409 U.S. 524 (1975) ... 13

McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984) *reh'g en banc denied* 756 F.2d 277 (2d Cir. 1985) 6, 7, 8, 12

Patton v. Yount, 467 U.S. ——, 104 S. Ct. 2885 ... 10, 16, 17
People v. Roman, 106 A.D.2d 261 (1st Dept. 1984), 484 N.Y.S.2d 389 (1984) ... 2, 6
People v. Roman, 64 N.Y.2d 785 (1985), —— N.Y.S. 2d —— (1985) ... 2, 6
Peters v. Kiff, 407 U.S. 493 (1972) ... 12, 14

Ristaino v. Ross, 424 U.S. 589 (1976) ... 11, 13, 16
Roman v. Abrams, 85 Civ. 763 (CLB) (S.D.N.Y. May 15, 1985), *appeal pending sub nom.* Abrams v. Roman No. 85-2191 (2d Cir. 1985) ... 2, 3

Schreiber v. Salamack, 85 Civ. 1263 (GLG) ... 2, 9
Swain v. Alabama, 380 U.S. 202 (1965) ... *passim*

PAGE

Taylor v. Louisiana, 419 U.S. 522 (1975) 11, 13, 17
Taylor v. McElroy, 358 U.S. 918 (1958), 360 U.S. 709 (1959) 9

United States v. Danzey, 476 F.Supp. 1065 (E.D.N.Y. 1979), *aff'd* 620 F.2d 286 (2d Cir. 1980) *Petition for reh'g en banc denied* 622 F.2d 1065 (2d Cir. 1980) 15

Williams v. Florida, 399 U.S. 78 (1969) 11

Constitutional and Statutory Provisions:

United States Constitution, Sixth Amendment 3, *passim*
United States Constitution, Fourteenth Amendment 3, 4, *passim*
18 U.S.C. 243 12
28 U.S.C. 1254(1) 2
28 U.S.C. 2101(e) 3
28 U.S.C. 2254 1, 6, 7, 9
U.S. Sup. Ct. Rule 18, 28 U.S.C. 3
F.R.A.P. Rule 22, 28 U.S.C. 3
New York Criminal Procedure Law § 270.25 (McKinney 1984) 4
New York Penal Law §§ 105.15; 105.10 (McKinney 1984) 4

Other Authorities:

The Federalist, Nos. 51, 81, 82 10

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PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays for a writ of certiorari before judgment to the United States Court of Appeals for the Second Circuit to review the judgment of the United States District Court for the Southern District of New York entered in the above-captioned case on May 28, 1985.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (Brieant, J.), *Roman* v. *Abrams*, 85 Civ. 763 (CLB) (S.D.N.Y. May 15, 1985), and the Judgment dated May 28, 1985 pursuant thereto, are appended hereto as Appendix A. The order of affirmance without opinion of the Supreme Court of the State of New York, Appellate Division, First Department, *People* v. *Roman*, reported at 106 A.D.2d 261 (1st Dept. 1984), 484 N.Y.S.2d 389 (1984), is appended hereto as Appendix B. The order of the New York Court of Appeals denying leave to appeal to that Court, *People* v. *Roman*, is reported at 64 N.Y.2d 785 (1985), —— N.Y.S.2d —— (1985), and is appended as Appendix C. The memorandum decision of the United States District Court for the Southern District of New York (Goettel, J.), filed on April 22, 1985 [*Schreiber* v. *Salamack*, 85 Civ. 1263 (GLG)] which denied the bail application of Harold Schreiber, who was charged with the same crimes and tried jointly with respondent, is appended as Appendix D. The endorsement of Judge Goettel dated June 10, 1985 which refused to adopt Judge Brieant's decision, refused to transfer Schreiber's habeas petition to Judge Brieant, and denied reconsideration of the court's earlier bail determination is appended as Appendix E.

Jurisdiction

The judgment of the United States District Court for the Southern District of New York (Brieant, J.), was rendered on May 28, 1985. On June 26, 1985, petitioner appealed to the United States Court of Appeals for the

Second Circuit [*Abrams* v. *Roman*, No. 85-2191 (2d Cir. 1985)].* Petitioner has fulfilled all procedural requirements of that Court for perfection of the appeal.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) which states that "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree," and by 28 U.S.C. § 2101(e) which states that "[a]n application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the Court of Appeals may be made at any time before judgment." Also relevant is Supreme Court Rule 18 which states that, "[a] writ of certiorari to review a case pending in a Court of Appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate process and to require immediate settlement in this Court."

Constitutional and Statutory Provisions Involved

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

United States Constitution, Fourteenth Amendment:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law, nor

* F.R.A.P. Rule 22, 28 U.S.C., authorizes such an appeal without a certificate of probable cause.

deny to any person within its jurisdiction the equal protection of the laws.

New York Criminal Procedure Law: (McKinney 1984)

§ 270.25 Trial jury; peremptory challenge of an individual juror.

1. A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service.

2. Each party must be allowed the following number of peremptory challenges:

(a) Twenty for the regular jurors if the highest crime charged is a class A felony, and two for each alternate juror to be selected.

(b) Fifteen for the regular jurors if the highest crime charged is a class B or class C felony, and two for each alternate juror to be selected.

(c) Ten for the regular jurors in all other cases, and two for each alternate juror to be selected.

Statement of the Case

The State Court Proceedings

Respondent was accused by the Grand Jury of Bronx County, while acting in concert with white co-defendant Harold Schreiber, of Conspiracy in the Second Degree and Conspiracy in the Fourth Degree (N.Y. Penal Law §§ 105.15 and 105.10) (McKinney 1984).

The Jury Selection

As found by Judge Brieant, the prosecutor, who had fifteen available peremptory challenges, challenged peremptorily a total of eleven prospective jurors, of whom eight were white, two others were said to be "light-skinned" Hispanic individuals, and one was black. An additional prosecutor's challenge had been exercised against a white juror, but was withdrawn when the court required the prosecutor to state his reasons for the challenge (Appendix A, p. 11a). When asked by the trial court to state the reasons for later challenges, the prosecutor asserted that his peremptory challenges were prompted by the difference in age and lifestyle between the prospective juror and the State's unsavory informant-witness (Appendix G, p. 52a), and the fact that another prospective juror had been employed as a computer operator (Appendix G, pp. 52a-55a).* Of the five whites who were not challenged by the prosecutor, the defense peremptorily excused two (Appendix A, pp. 8a-10a). The final petit jury was composed of three whites, three hispanics, and six blacks (Appendix H, p. 66a).

The Conviction and Appeal

Respondent and his co-defendant were each convicted of conspiracy in the fourth degree. Respondent's conviction was unanimously affirmed without opinion by the

* Subsequently, at the evidentiary hearing in the District Court, the prosecutor noted that this prospective juror had also been a victim of a crime and that the prosecutor felt that because he had been a computer operator he perhaps would not follow the reasonable doubt standard and would perhaps adopt a mathematical certainty standard. In addition, the prosecutor also stated that during *voir dire* respondent's attorney had used an analogy concering computers with the prospective juror which could have had an adverse effect on the state's case (Appendix H, pp. 59a-60a).

Supreme Court of the State of New York, Appellate Division, First Department, *People* v. *Roman,* 106 A.D.2d 261 (1st Dept. 1984) (Appendix B), and leave to appeal to the New York Court of Appeals was subsequently denied. *People* v. *Roman,* 64 N.Y.2d 785 (1985) (Appendix C).

The Federal Court Proceedings

Respondent petitioned, pursuant to 28 U.S.C. § 2254, for a writ of habeas corpus in the United States District Court for the Southern District of New York alleging that during jury selection the prosecutor's peremptory challenges were racially motivated "to obtain as black a jury as possible because the defendants were white, the prosecution's chief witness was black and the community in which the arson allegedly was to take place was black" (Appendix F, p. 50a). Subsequently an evidentiary hearing on this issue was conducted before the Hon. Charles L. Brieant. At that proceeding, the trial prosecutor testified and asserted that he had never used race as a criteria for jury selection but rather, based his peremptory challenges on the prospective jurors' backgrounds, juxtaposing such factors as their educational attainments and employment, against the facts and circumstances of the case (Appendix H, pp. 56a-58a, 61a-67a).

Judge Brieant, on the constraint of *McCray* v. *Abrams,* 750 F.2d 1113 (2d Cir. 1984) *reh'g en banc denied,* 756 F.2d 277 (2d Cir. 1985), granted the writ and also found that the prosecutor's reasons for the peremptory challenges were "pretextual" (Appendix A, pp. 12a-15a, 33a). Prior to Judge Brieant's decision, however, another judge of that Court, the Hon. Gerard L. Goettel, in denying co-

defendant Harold Schreiber's bail application, reasoned that the *McCray* Court never "intended reciprocal treatment for white defendants, since the opinion is overwhelmingly concerned with the rights of minorities" and then observed that "the likelihood of success is not so great as to warrant the granting of bail at this time" (Appendix D, p. 44a). Later Judge Goettel refused to adopt Judge Brieant's decision as controlling in co-defendants's habeas proceeding (Appendix E).

REASONS FOR GRANTING THE WRIT

POINT

The Writ of Certiorari before judgment should issue to review whether allegations of prosecutorial discrimination against whites warrant federal habeas review under the Sixth and Fourteenth Amendments in a case in which three whites served as jurors because: (1) this term, the Court will consider an analogous claim regarding discrimination against blacks in a case arising on direct appeal from a State Court; (2) it also has pending before it a petition for certiorari from the only federal appellate decision holding that such allegations may support federal vacatur of a state conviction; and (3) review in this case would give the Court the opportunity to define the proper scope of federal review of such allegations at the same time that it decides the Question Presented in the Direct Appeal from the State Court.

This case presents the question of whether the power of the Federal Judiciary to vacate a state criminal judgment under 28 U.S.C. § 2254 should extend to the overturning of a guilty verdict, rendered by a jury of three whites, three

hispanics, and six blacks, based upon the convicted defendant's allegations that during jury selection the prosecutor's peremptory challenges were racially motivated "to obtain as black a jury as possible because the defendants were white, the prosecution's chief witness was black, and the community in which the arson allegedly was to take place was black" (Petition for habeas corpus, Appendix F, p. 50a). The Court has agreed to decide the closely analogous question posed in *Batson* v. *Kentucky*, No. 84-6263, *Cert. granted*, April 22, 1985, of whether a state court errs when it accepts a trial jury in which the prosecutor exercised four of six challenges to exclude *all* blacks, and it has not decided whether to consider the questions presented in *Abrams* v. *McCray*, No. 84-1426, petition for cert. filed March 4, 1985, 53 *U.S.L.J.* 3671 (hereinafter *Abrams* v. *McCray*) in which the petitioner concludes that the Court should "overturn *Swain* and rid the judicial system of the last vestige of intentional discrimination."

This case arises from the turbulent wake caused by the Second Circuit's decision in *McCray* v. *Abrams*, 750 F.2d 1113 (2d Cir. 1984), *reh'g. en banc denied*, 756 F.2d 277 (2d Cir. 1985), (hereinafter *McCray*) *cert. pending sub nom: Abrams* v. *McCray*, No. 84-1426, and it clearly demonstrates the pernicious effect on state affairs caused by a ruling that mere allegations of the type made here are worthy of Federal habeas review. Additionally, when it considers the evil done to state affairs by the *McCray* opinion below, the Court should know that, in considering the habeas petition of Harold Schreiber, the co-defendant in the state trial at issue here, Judge Gerard Goettel of the Southern District of New York is apparently of the view

that white co-defendant's constitutional rights were not violated by the same prosecutorial actions challenged here. [*Schreiber* v. *Salamack,* 85 Civ. 1263, Mem. Opinion of April 22, 1985 and Endorsement of June 10, 1985 (Appendix D & C)]. Clearly the confusion that *McCray* has caused to state affairs in the Second Circuit (and in Bronx County in particular) is manifest, for two Federal judges considering the same claim on the same record appear to have reached opposite conclusions on the Constitutional claim presented by the defendant's allegations. Thus, review of this case in conjunction with *Batson* v. *Kentucky* would: (1) allow the Court to consider claims of racism in jury selection directed at blacks and whites; (2) give it the opportunity to examine the impact that the implicit overruling of *Swain* v. *Alabama,* 380 U.S. 202 (1965) by one Federal Circuit Court of Appeals has already had on a state criminal justice system; and (3) give it the opportunity to define the proper extent of federal review of allegations of racism in jury selection when presented in the context of a 28 U.S.C. § 2254 petition. The Court has granted writs of certiorari before judgment under similar circumstances in the past. *E.g., Taylor* v. *McElroy,* 358 U.S. 918 (1958), 360 U.S. 709, 710 (1959).

Although the named petitioner, Robert Abrams, seeks certiorari in this case as well as *Abrams* v. *McCray,* the State's position is significantly different in each.* Here the State agrees that racism is morally wrong, that it must

* In New York State, the District Attorney who obtained a conviction may represent the named petitioner, the Attorney General of The State of New York, in Federal habeas litigation. Here the difference in the State's position between this case and *McCray* is due to the fact that different District Attorneys are representing the State's interest in each proceeding.

not be tolerated, and that a criminal trial in which a prosecutor excludes jurors for reasons of race alone in order to prejudice the accused is an anathema. The State neither supports nor condones this practice, but here it asserts that overruling *Swain* is not the solution to the problem. Here the State asserts that the history of the Sixth Amendment and the Court's prior opinions in the jury selection cases require that *Swain* be reaffirmed, and that—in the context of a federal habeas petition—Federal review: (1) should begin with *Swain's* presumption that "the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court." *Swain* at p. 222; (2) should presume that, in the 1980's, State courts are vigilant in eradicating racism in jury selection; and (3) should conclude that the State courts have fulfilled this function in the absence of overwhelming proof to the contrary. Cf., *Patton* v. *Yount*, 467 U.S. ——, 104 S. Ct. 2285, 2891-2892 (1984). Our Constitutional history supports this position.

In 1789 when the Constitution was enacted, the Founders did not consider racism to be a particularly pressing moral problem, see for example the analysis of *Dred Scott* v. *Sanford*, 19 How. 393, 60 U.S. 393, 403-406 (1857), but they did know the sting of prejudice (*see The Federalist* No. 51), and they clearly considered the subject of an impartial jury in a criminal trial in both the state and federal contexts when they drafted and passed the Constitution (*see, e.g., Duncan* v. *Louisiana*, 391 U.S. 145, 151-54 (1968), *and see The Federalist* Nos. 81 and 82). This case arises from a conspiracy to commit an arson in just one of the many communities in one of the large urban counties of New York State, and it presents the question of whether the Founders intended that the State and local authorities,

or the federal government, should be entrusted with guaranteeing that the persons accused of *this* crime receive a fair trial "by an impartial jury of the State and district wherein the crime shall have been committed."

The Court's prior review of the Constitutional history in this area demonstrates that the Founders intended that matters concerning the prosecution of local crime should be left to the local authorities with regard to the actual composition of the trial jury [*see Williams* v. *Florida*, 399 U.S. 78, 86-103 (1969); *see also, Ristaino* v. *Ross*, 424 U.S. 589, 594 (1976) (jury selection is conducted under the supervision of the state court, and left to its sound discretion)], and the Court has held that the Sixth Amendment requires that the States provide the accused with a jury panel that fairly represents the community, but it has imposed "no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." *Taylor* v. *Louisiana*, 419 U.S. 522, 538 (1975).

In this case the State argues that the intent of the Founders should be followed and that the Court should hold that the Sixth and Fourteenth Amendments require that the Federal government should prevent challenges based solely on racial prejudice in Federal criminal trials and that State and local authorities should prevent challenges to jurors based on racial prejudice alone in local trials. This case demonstrates the mischief that is done both to state affairs and to the national perception of the criminal justice system when, in considering a federal habeas petition, the federal judiciary tries to identify racism during jury selection in a local criminal trial under

the standards announced by the Second Circuit in *McCray*. It also fortells the mischief which would be done to state and local affairs if the Court were to overrule *Swain* as the petitioner in *Abrams* v. *McCray* now requests. Indeed, as the Roman and Schreiber petitions demonstrate, if the *McCray* solution were to become the law of the land, the floodgates would open and virtually every state criminal judgment in which the prosecutor challenged *any* juror of the defendant's race would be the subject of collateral federal litigation irrespective of the actual composition of the petit jury. As a matter of fact given the present state of the law in the Second Circuit, it has become virtually impossible to know how to select a jury in a criminal case, and the states must live with the unsettling specter of vacatur of every conviction regardless of the racial makeup of the jury which renders it. For this reason, a decision from the Court at this time regarding the proper scope of federal review of these cases is of imperative public importance to the administration of the criminal justice system in every state.

The State does not argue that federal courts or the federal government should be powerless to act against the practice of racial prejudice used for the purpose of harming the accused in a state criminal trial.* The Court announced no such rule when it considered this subject in the context of the Equal Protection Clause in *Swain,* at pp. 226-27. The State submits that this Constitutional principle is sound and that the federal courts should have the same power to review allegations of racism under the

* It is a crime for a public official to exclude qualified jurors on the basis of race. 18 U.S.C. § 243; *Peters* v. *Kiff,* 407 U.S. 493, 498 (1972).

Fourteenth Amendment's Due Process Clause as they now possess under the Equal Protection Clause.*

The State asserts, however, that before a Federal court considering a habeas petition exercises this power under the Due Process Clause to vacate a state judgment of conviction, it must be cognizant of the fact that the Constitution commands that a prosecutor choose an "impartial" jury rather than a jury of a particular racial make-up. *Taylor* v. *Louisiana, supra.* The State asserts that the Constiution recognizes that all prospective jurors bring opinions and prejudices about a variety of matters with them to the courtroom and that the process of choosing the impartial jury vouchsafed by the Sixth Amendment involves an assessment by the advocates of the juror's ability to fairly evaluate whether the prosecution proved its case based on the evidence despite the influence that their opinion and prejudices may have on their assessment of other matters that affect their lives. *Swain* v. *Alabama, supra,* at 221; *Aldridge* v. *United States,* 283 U.S. 308, 313 (1931).

Considerations of the prospective juror's race and gender must of necessity play a role in this process because, obviously, race and gender are among the first characteristics that each of us observes about every person that we pass on the street. To claim otherwise, or to assert that a prosecutor may not consider these factors in selecting a jury, is to state that a prosecutor must select a jury without even subconsciously considering factors which are as plain as the nose on a juror's face. It is

* Federal courts have not been lax in reviewing claims of faulty jury selection procedures in state trials, *Ristaino* v. *Ross, supra; Ham* v. *South Carolina,* 409 U.S. 524 (1975).

clear that precluding consideration of these factors at all (as would be the result if the Court accepted the *Abrams* v. *McCray* conclusion) is no solution to the problem of prejudice and racism, because the extent to which these factors may affect the decision to challenge or to accept a specific juror is unknowable, particularly in an urban county like the Bronx where the witnesses at trial (and indeed the defendants in a joint trial) frequently are of more than one race. Adoption of this conclusion would be poor policy as well, for to tell state prosecutors throughout the nation that they must not exclude jurors on the basis of race (here white jurors) is to tell them that they must select jurors because they are white. This too is racism: *e.g.*, *Peters* v. *Kiff*, 407 U.S. 493, 502, 503 (1972); it is wrong, and, the State submits, for this reason the Court should adhere to the rule that presumptively a prosecutor's challenges are exercised on non-racial grounds and that Federal courts should defer to this presumption, remembering that the Court stated in *Swain* at pp. 220-21, ". . . the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be."

The presumption should not be irrebuttable as *Swain* recognizes, but it should stand unless there is overwhelming proof to the contrary. Such proof might appear, as the Court recognized in *Swain* at pp. 226-28, if there were a pattern of racism by a particular prosecutor, and, perhaps, it might be found to appear if racial motives concededly were used to exclude otherwise qualified jurors. In the Second Circuit it is unclear whether the prosecutor's admission that he had a practice of excluding jurors

of the defendant's race would be sufficient to warrant disregarding the *Swain* presumption, however. In a federal trial, the Second Circuit found that the prosecutor's open admission to this effect in the context of one case did not warrant upsetting the federal conviction. *See, e.g., United States* v. *Danzey,* 476 F.Supp. 1065 (E.D.N.Y. 1979), *aff'd,* 620 F.2d 286 (2d Cir. 1980) *petition for reh'g en banc denied,* 622 F.2d 1065 (2d Cir. 1980). Yet in this case, the federal court reviewed a state trial and vacated a state conviction because it found a silent admission that racism prompted the prosecutor's challenges despite the state prosecutor's denials under oath that such was the case. Clearly the result reached in this case cannot be squared with *Danzey* in which the *Swain* presumption prevailed, and the state asserts that in this case where the jury consisted of three white,* three hispanics, and six blacks, the presumption that the prosecutor acted properly must be applied under the Due Process Clause, and it must be binding on the Federal judge who considers the allegations in this habeas petition, as it was found to be in *Danzey* where the court reviewed a Federal prosecutor's use of the peremptory challenge. In addition to making sound national policy, this rule makes good common sense as well, for challenges that may appear to be racially motivated and which lead to the type of allegation made here frequently are exercised for non-racial reasons.

For example, if the defendant's mother were called as a prospective juror and if the trial judge denied the prosecutor's challenge to her for cause, the prosecutor would certainly challenge her peremptorily. Although the de-

* Of the five whites unchallenged by the prosecution, the defense peremptorily excused two (see Appendix A, pp. 8a-10a, rounds 2, 5).

fendant's mother is obviously of the same race as the defendant, clearly this challenge is based on reasons other than race. The point of this somewhat far-fetched example is that things are frequently not what they may appear to be to a detached Federal District Judge who is confronted with the allegation that "the community in which the arson allegedly was to take place is black" (Appendix F, p. 50a) and who reviews the cold record long after the state trial and state appellate process has concluded. For this reason the Federal courts must defer to the principle announced in *Swain* that the Constitution recognizes that the selection of a local jury may, as the State submits it did in this case, rest almost totally on local factors, for example the jurors' knowledge of the locale of the crime, the local job market and the jurors' experience with it as compared to that of the witnesses and the defendants, long-standing inter-neighborhood disputes, familiarity with the witnesses or the defendants themselves or with the neighborhoods from which the witnesses and defendants come. It is for this reason that the Constitution entrusts the supervision of local jury selection to the States, which with their superior knowledge of local conditions and affairs are best equipped to recognize a proper challenge resting on local concerns even though the challenge leads to allegations of racism by defense counsel. *See Ristaino* v. *Ross, supra; Patton* v. *Yount, supra.*

Federal judges have the same Constitutional responsibilities with respect to federal trials of federal crimes and they must prevent racism when they see it before them, but since these crimes deal with national and interstate issues, local neighborhoods' concerns are of small moment in jury

selection. Because the Federal judge's time and attention are focused upon these important and frequently complex and difficult matters, the Federal judge may not be deemed to have the intimate knowledge of local neighborhood affairs that the state judiciary possesses, and thus may be too prone to label a state challenge as racist merely because it might appear so from the broader, less parochial, federal perspective. This is the wrong that was done to local affairs in this case, and this is the wrong that the Court must correct.

The Court's decisions regarding the racial make-up of the jury require that the jury panel fairly represent the racial mix of the community (*See e.g. Castaneda* v. *Partida*, 430 U.S. 482 (1977); *Taylor* v. *Louisiana, supra*). This was done in this case, and because the racial make-up of the jury panel *vis a vis* the racial mix of the community may be objectively verified, federal review is appropriate. But because the final jury was selected on local considerations which do not lend themselves to objective verification, review of whether the prosecutor's challenges were exercised for proper, case-related motives should be left to those most qualified to make the assessment: the state judges who live and work in the locality in which the case was tried. The determination that the prosecutor acted properly is subject to review by the state appellate courts, and if upheld, their determination should be binding on the Federal judiciary absent overwhelming proof to the contrary. *Patton* v. *Yount, supra.*

In this case the jury panel accurately reflected the racial make-up of the community [white 33.9%, black 29.8%, hispanic 33.9% (Habeas Hearing Exhibit No. 1)], and the ultimate trial jury which tried a white defendant consisted

of three whites, three hispanics, and six blacks. Thus, this Court should grant the petition for certiorari before judgment and should ultimately hold that, as a matter of Constitutional principle, the defendant made an insufficient showing that racism occurred in the selection of his jury. Accordingly, it should hold that principles of federalism and due regard for the rights of the states preclude inquiry by a Federal Judge into whether racism played a role in the selection of this jury and that the District Judge erred in holding an inquiry.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari Before Judgment should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the United States District Court for the Southern District of New York (Brieant, J.)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

85 Civ. 0763-CLB

MICHAEL ROMAN,

Petitioner,

against

ROBERT ABRAMS, Attorney General of the State of New York,

Respondent.

MEMORANDUM AND ORDER

Brieant, J.

On December 4th of last year, breaking with long standing precedent, the Second Circuit, in *McCray* v. *Abrams*, 750 F.2d 1113 (2d Cir. 1985), *rehearing en banc den.*, 756 F.2d 277 (2d Cir. 1985), *petition for cert. filed* March 4, 1985, 53 U.S.L.W. 3671, "spell[ed] the end of the peremptory challenge as an effective jury selection tool," in state criminal trials (Meskill, J., dissenting). The Court held that: "[T]he Sixth Amendment's guarantee of trial by an impartial jury . . . forbids the exercise of [peremptory] challenges to excuse jurors solely on the basis of their racial affiliation." 750 F.2d at 1131. It also turned the jury selection process into a possibility of twenty

mini-trials within a Class A felony trial in New York, as the court determines whether the prosecutor's "reasons" for exercising peremptories are "genuine" or merely "pretextual". *Id.* at 1132. Defendants, because their exercise of peremptory challenges are not "state action," and because a "reason" to challenge a juror which originates with the client will be a privileged communication, will be subject to no such mini-trial. The inequality produced thereby must lead to abolition or severe reduction of peremptories. We discuss *McCray* and its predecessors more fully *infra* p. 15. In the meantime, we consider how the rule of *McCray* is to be applied to this white petitioner.

Petitioner Michael Roman, a white person, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Roman challenges his conviction in the New York State Supreme Court, Bronx County first, on the ground that he was deprived of his Sixth Amendment right to a trial before a fair and impartial jury comprised of a cross-section of the community, due to the prosecutor's use of his peremptory challenges to exclude white venirepersons solely because of their race. He also makes the customary assertion that he was denied his Sixth Amendment right to effective assistance of counsel. This latter contention need not detain us; counsel so maligned had the foresight to anticipate *McCray* almost three years before it came down.

Prior Proceedings

On December 18, 1981, petitioner was convicted by a jury in Supreme Court, Bronx County, along with his co-defendant, Harold Schreiber, of conspiracy in the fourth

degree, arising out of an arson-for-hire agreement. Petitioner appealed his conviction and on December 8, 1984, the Appellate Division, First Department, affirmed without opinion. *See People* v. *Roman,* —— A.D.2d ——, 484 N.Y.S.2d 389 (1st Dept., Dec. 6, 1984). Petitioner then sought leave to appeal to the Court of Appeals of the State of New York. That application was denied on January 28, 1985. In his state appeals, petitioner raised the contentions presented here. *See* Ex. 1 to Answering Affidavit of Allen H. Saperstein (sworn to February, 1985). Since these federal claims were both fairly presented to the state courts, defendant has exhausted his state court remedies as required by 28 U.S.C. § 2254. *See Daye* v. *Attorney General of State of New York,* 696 F.2d 186, 192-94 (2d Cir. 1982). Having exhausted his appeals at the state level, petitioner filed his petition in this Court on January 29, 1985, proceeding by order to show cause. The execution of petitioner's judgment of conviction was stayed pending consideration of the petition, he was enlarged or continued on his existing state bail, and an evidentiary hearing was held before me on the jury selection claim.[1] Decision was reserved. Set forth below are the findings of fact and conclusions of law of this Court following its evidentiary hearing.

The Trial

The prosecution's chief witness was one Ernest Brooks, a Black man with a criminal record. Mr. Brooks had been

1. Although permitted to remain at liberty under the conditions that had been imposed by the state court, petitioner is "in custody" for purposes of 28 U.S.C. § 2254. *See McCray* v. *Abrams,* 750 F.2d 1113, 1114, n. 1 (2d Cir. 1984).

arrested on July 3, 1980 on a charge of burglary. He negotiated with the prosecutor in exchange for leniency on his burglary charge, to furnish information concerning his participation in an ongoing conspiracy to blow up a building in the Bronx. According to Mr. Brooks, the explosion was to take place the following day at the Hunts Point Taxi Exchange, a building owned by Harold Schreiber at which petitioner was employed.

On July 4, 1980, and on three other occasions in July, Brooks, acting as an undercover equipped with a tape recorder, engaged petitioner Michael Roman in several conversations.[2] Brooks testified at length at trial, both on direct and cross-examination, as to his activities and concerning the context in which the taped conversations had taken place. During the trial, only one and part of another of the taped conversations were introduced by the prosecution for consideration by the jury. Although many of the words on tape are apparently unintelligible (*see* Ex. 4A, Tr. of July 15, 1980 tape), there are words spoken by Roman on July 15, 1980 which could support the inference that he did intend that the building be destroyed. He was heard discussing a procedure to be effected on the roof of the Taxi Exchange, to block the vents, in order that a gas explosion in the building might be enhanced.

In addition to the tape recording and Brooks' testimony as to the details of the conspiracy, the prosecution presented other witnesses who testified as to Schreiber's

2. Brooks testified that he was sure Roman became aware some time after July 15, 1980 that Brooks was recording the conversations. It appeared from one of the tapes that Roman was staring at Brooks during one of the conversations, supposedly looking for the wiring or the tape recorder itself. (Trial Tr. at 456-58).

financial difficulties, (Trial Tr. at 981-83), that Schreiber had obtained recent increases in the insurance coverage for the building (Trial Tr. at 864-65, 867-70), and that the alleged scheme to blow up the building was feasible. (*E.g.*, Trial Tr. at 837-38, 911-12, 914, 922-24, 926).

The evidence at trial, including Brooks' testimony, was sufficient to support a conviction, notwithstanding evidence or argument submitted by the defense that talk of the conspiracy was just a "joke." (Trial Tr. at 1146).

Violation of Petitioner's Right to an Impartial Jury

We consider first whether petitioner was denied his right to a fair trial as guaranteed by the Sixth Amendment to the United States Constitution, made applicable to the states since 1968 through the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968).

During the jury selection process, both counsel for the defendants complained vociferously to the trial judge that the prosecutor was deliberately utilizing his peremptory challenges to exclude whites from the panel of proposed jurors in order to obtain a petit jury comprised of as many minority panel members as possible. Petitioner through his trial counsel claimed, and now claims, that these actions on the part of the prosecutor to exclude white jurors deprived him, as a Caucasian, of his right to a jury trial before an impartial jury comprised of a fair cross-section of the relevant community. We consider first the jury selection procedures as revealed from the trial transcript itself.

The challenges were exercised in rounds, the prosecutor acting first, all in conformity with New York Crim-

inal Proc. Law § 270.15. Because it was a Class C felony case, each side was entitled to fifteen peremptory challenges. New York Crim. Proc. Law § 270.25.

Round 1

On August 17, 1981, a panel of twelve potential jurors was drawn at random from a panel of venirepersons and seated as follows:

Juror No. 1	Bertha Hammons	
No. 2	Yvonne Bumpers	
No. 3	Emma Cauldwell	
No. 4	Jay Heager	*
No. 5	Richard Harnz	*
No. 6	Carmen Valez	
No. 7	Olga Valacquez	
No. 8	Tina Martinez	*
No. 9	Camille Viscargllio	*
No. 10	Isabelle Martin	*
No. 11	Lindrina Rosario	*
No. 12	Robert Theodore	

(Voir Dire at 13).[3]

After extensive questioning of the panel by both the trial court and counsel, giving rise to no challenges for cause, counsel were each given their opportunity to exercise peremptory challenges. The prosecutor challenged six persons peremptorily. They were panel members Nos. 4, 5, 8, 9, 10 and 11, indicated by an asterisk, above.

Defense counsel raised an immediate objection, pointing out clearly to the trial court that the prosecutor had exercised these six challenges so as to exclude every white

3. All names listed are spelled as in the trial transcript.

juror then seated. (Voir Dire Tr. at 51-52). The prosecutor responded lamely that only four of his challenges were against white jurors, and that the other two challenged were Hispanic. (*Id.* at 52). Defense counsel continued this high level discourse by observing that the two Hispanics were "light-skinned." It is clear from colloquy in the record that no white jurors remained in the box at the conclusion of the prosecutor's peremptory challenges in Round 1. (*Id.*). After defense counsel, acting jointly as required by local practice, had exercised four peremptory challenges, the two remaining panel members, Yvonne Bumpers and Carmen Valez, were seated as jurors Nos. one and two. (*Id.* at 54). As such, each was immune from further peremptory challenges. It is clear from the context of the trial record that neither of these two jurors was white, and I so find.

Round 2

A group of ten replacements was drawn from the venire and seated in the jury box for further questioning by counsel, as follows:

Juror No. 3	Doreen Williams	
No. 4	Bernard Ryan (Harry Therber)	*
No. 5	Haddie Barnharm	*
No. 6	Edith Hicks (John Cullan)	*
No. 7	Alice Carlson	
No. 8	Richard Davis	
No. 9	Margaret Green	
No. 10	Willie Hill	

Appendix A

No. 11 Julius Tesler
No. 12 Marie Hines (Elice Roy)

(Voir Dire at 54-61).[4]

After voir dire examination, the prosecutor exercised three more peremptory challenges, excluding panel members Nos. 4, 5 and 6. (*Id.* at 66). Two of these three persons were also white. (*Id.* at 67). Defense counsel both objected to this action. (*Id.* at 66-67). Only one white juror remained in the box after the prosecutor's challenges in the second round.

Defense counsel then exercised three joint peremptory challenges of their own, excusing one juror who was white. Defense counsel felt compelled to state that his reason for excluding the only remaining white juror was that the person was "illiterate." (*Id.* at 67-68). However, his action was not state action, and there is no evidence of bad faith on his part, assuming that it matters. Again, at the conclusion of the second round of challenges, the prosecutor had used nine of his fifteen permitted challenges, at least six of which had been used to exclude white persons from the panel. The defense had used seven of their fifteen joint challenges, only one of which was exer-

4. The names in parenthesis are those who replaced persons originally called, but dismissed for cause either by request of counsel or *sua sponte* by the trial court. Although petitioner alleges that at least one juror was improperly challenged for cause, the intervening ruling of the trial court is sufficient to render such challenge irrelevant to the issue of whether the *prosecutor* was exercising his peremptory challenges to exclude white persons solely because of their race. The grant or denial of a challenge for cause is directed to sound judicial discretion and there is no evidence here of an abuse of such discretion. Accordingly, rulings on such challenges will not be considered for purposes of this petition. (*See* Voir Dire at 6).

cised against a white juror. At the end of this round, then, six jurors had been seated permanently; none of whom was white.

Round 3

The remaining six seats were then filled. After further questioning, and the dismissal of one juror for cause, the prosecutor challenged one of the six and defense counsel excused two others. It may be inferred from the lack of objection by defense counsel, and by certain unchallenged comments of the prosecutor on the record, that all three peremptory challenges on this round were lodged against black jurors. (*See id.* at 77, 101). Apparently, of the nine individuals seated permanently as jurors at the conclusion of this round, two were white, and I so find. (*Id.* at 100).

Round 4

Three replacement jurors were seated. One of the three was excused on the prosecutor's challenge for cause, and defense peremptorily excused the remaining two, both of whom were black. (*Id.* at 85, 88).

Round 5

Three prospective jurors were again seated in the jury box. Two of these jurors were excused on consent and their seats were filled. Then, after one of the three new prospective jurors was excused for cause, defense counsel exercised their peremptory challenges against the remain-

ing two prospective jurors, one of whom was white. This left three vacant seats. (*Id.* at 89-93). Only two white jurors remained seated as jurors.

Round 6

The three remaining seats were filled once again. The prosecutor challenged two of the three jurors peremptorily, both challenges being exercised against white persons. (*Id.* at 100). When defense counsel again pointed out to the trial court that the prosecutor was continuing to exclude white persons from the panel, the trial judge invited the prosecutor to place his reasons for exercising the two challenges on the record. (*Id.*). That invitation soon turned into a direct request by the court for the prosecutor to state his reasons. (*Id.* at 103).

Rather than comply fully with the trial court's request, the prosecutor *withdrew* one of his challenges. As to the other juror, his comment was "I don't feel she can be fair and impartial *to my witnesses.*" (*Id.*). No further reason of any kind was proffered. Defense counsel exercised no challenges. Due to the withdrawal by the prosecutor of one of his peremptory challenges on this round, three white jurors then remained on the panel.

Round 7

The last remaining seat on the jury was filled, and once again the prosecutor exercised a peremptory challenge. *Id.* at 136). Defense counsel again voiced an objection. At the request of defense counsel, and after some prodding by the court, the prosecutor stated his "reason" for the

challenge: "I believe based on his background." (*Id.* at 138). The juror so excused was white.

Round 8

No peremptory challenges were exercised by either side in this final round, so the twelfth juror was thus sworn and selection of the regular panel was complete. Two alternate jurors were then selected and, neither being challenged, jury selection was concluded.

Discussion

Aside from challenges for cause, which we assume to have been proper for purposes of this petition, the prosecutor challenged peremptorily a total of eleven prospective jurors, eight of whom were white, two others said to be "light-skinned" Hispanic individuals, to be regarded as white for our present purposes, and one black. An additional challenge had been exercised against a white juror, but was withdrawn when the court required the prosecutor to state his reasons for the challenge.[5] Aside from the alternates, then, the final jury panel consisted of three white persons and nine jurors who were perceived to be black or dark-skinned Hispanic.

Petitioner asserts, and I conclude in light of *McCray*, that the pattern of challenges exercised by the prosecutor at trial was sufficient to make out a *prima facie* case to the effect that the challenges had been exercised deliberately to exclude potential white jurors solely because of

5. Defense counsel together challenged a total of thirteen jurors, two of whom were white and the rest minorities. For reasons noted in the text we regard this fact as irrelevant.

their race. Under *McCray*, this imposes a burden on the prosecutor to come forward and present "some reason other than group affiliation for the challenges. *McCray*, 750 F.2d at 1133.

The state judiciary has refused to require the prosecutor to give reasons. See *People* v. *McCray*, 57 N.Y.2d 542, 547 (1982). The trial court attempted unsuccessfully to get the prosecutor in this case to do so. To the extent the prosecutor did respond at all to the trial judge, his comments were most revealing. In Round 6, as to one challenge, the admission was made by the prosecutor that he believed that the white juror could not be fair *to my witnesses.* (Voire Dire Tr. at p. 103). No reason for this belief was given, nor does one appear from the record. The principal witness for the prosecution was a black person who was characterized later at the federal habeas hearing by the prosecutor (Tr. at 56), as "not very bright," who had an "extensive [criminal] record," "plainly he was a commercial burglar" with "20 or 30" burglary arrests, and "violent enough not to have people even listen to who he is" (*id.* at 57). This is a plain admission by the prosecutor of an invidious, racially motivated exercise of at least one peremptory in Round 6. As to the other such peremptory exercise in that Round, rather than verbalize a reason, the prosecutor *withdrew* his challenge of a white juror, in the tradition of the child whose fingers had been caught in the cookie jar.

The "reasons" given at the federal habeas hearing were likewise childish and pretextual, as well as unbelievable. The prosecutor testified at the federal habeas hearing before me. I do not say that he wilfully perjured him-

self in 1985 with respect to his motivations and subjective thinking at the voir dire conducted in 1981. However, he in effect concedes, and I find, that due to the passage of time, he has no present recollection of what his thinking was then. His contemporaneous courtroom notes have been preserved, but he cannot now read much of his own writing, and neither can this Court. Moreover, even were we able to decipher those notes, their relevance is nil in light of the prosecutor's testimony at the habeas hearing that he does not know now whether the various individual juror attributes listed on these partly legible notes necessarily caused him to decide to challenge or to refrain from challenging a particular juror. (Habeas Tr. at 87-89). At the federal habeas hearing, he has tried, with great effort, using the transcript of the voir dire proceedings at trial, and that portion of the courtroom notes which he can now decipher, to reconstruct his reasoning in 1981. This great effort has led to a lot of lawyer circumlocution, folklore and cant, either unbelievably trivial and incredible, or pointing most strongly to the inescapable inference that the prosecution set out to skew the jury selection process so as to remove as many white jurors as possible in direct contravention of the proscriptions set forth in *McCray, supra.* For example: He excused Hager (Heager), in Round 1, he now says, because he knew one of the defense counsel, but no attempt was made to challenge for cause. He now says he excused Hahn (Harnz) in Round 1 because he was employed in "electronics," which was a "too technical background for the type of juror I wanted in this case." (Voir Dire at 43). Such a claim has a hollow

ring; this commercial arson trial involved testimony about the financial condition of Schreiber and the placement of new insurance, as bearing on motive.

The third juror challenged in Round 1 was Isabel Martin. During the course of the habeas hearing the witness stated that he could not recall his reason for challenging this white juror. (Tr. at 45). And, a fourth juror challenged by the prosecution was employed as a bookkeeper. In addition this person had a nephew who was employed as a police officer. (*Id.* at 45). Three years later the prosecutor states that he challenged the juror on the ground that she was a bookkeeper and would therefore have difficulty accepting the reasonable doubt standard. (*Id.*). For further justification of this challenge, the prosecutor volunteered that the relationship of the juror to a police officer also bore upon his decision:

> "Ordinarily while a prosecutor may want someone who is connected to the police in some way, in this case due to the type of informant I had, who had a very extensive record, I felt that people who were too law and order oriented could not accept the type of complainant or informant that I was going to base my case on." (*Id.* at 45-46).

Considering the fact that two jurors who were later empanelled also were relatives of police officers, I find the witness' assertion to be intentionally misleading, and the product of selective recollection of the sort where the wish is father to the thought.

Having had the opportunity to observe this witness' demeanor in court and finding inconsistencies throughout

his testimony, not only in the above-cited instances, but in various others as well, I find that the reasons given now, three years after the fact, for exercising peremptory challenges cannot be accepted as correct and are pretextual. The prosecutor had the opportunity to give reasons for the challenges at the time of trial. Having foregone that opportunity, the inference that the challenges were racially motivated is quite strong, especially where, as here, out of eleven challenged jurors, ten are white.

More than once, at the trial and in the federal habeas corpus hearing, Roman's prosecutor in effect conceded that at least some of his challenges were racially motivated. Verbalizing those challenges as intended to obtain jurors with whom the credibility of the prosecution's black accomplice witness would be enhanced, as he did (Habeas Tr. 55-57), describes the doughnut without mentioning the hole that goes with the doughnut; such discriminatory selections diminish the rights of the defendant to a representative jury at the final stage of the selection process, as granted in *McCray*.

Based on the entire record before me I am convinced and find that the prosecutor used his peremptory challenges deliberately, insofar as possible, to effect the invidious purpose of eliminating or reducing the number or proportion of white jurors who would try Roman's case. We now consider the impermissibility of these actions in light of *McCray*.

Any discussion of use by a prosecutor of peremptory challenges to exclude potential jurors from sitting on a particular petit jury, based on factors such as race, religion, national origin, membership in a "cognizable

group" or other stereotype, must begin with the case of *Swain* v. *Alabama*, 380 U.S. 202 (1965), in order that the newly announced rule of *McCray* may be placed in a proper context.

In *Swain*, a black petitioner, convicted in Alabama of rape and sentenced to death after trial by a jury composed entirely of white persons, challenged his conviction because the prosecutor exercised his peremptory challenges so as to exclude the only six available black venirepersons from the petit jury. His pleadings relied on a claimed violation of the Equal Protection Clause of the Fourteenth Amendment.[6] At the time, the Supreme Court had not yet discovered that the Sixth Amendment was applicable to the states, announced three years later in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). In *Swain*, the Court upheld a system of using peremptory challenges, "without cause, without explanation and without judicial scrutiny," *id.* at 212-13, similar to that used in *McCray's* state trial and that of our petitioner. The Court accepted the contention of Alabama that its system of striking jurors, "whether they be Negroes, Catholics, accountants or those with blue eyes," was "a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial." *Id.* at 212. The *Swain* Court traced the history of the peremptory challenge to English common law, where it was the "persistent . . . view that a proper jury trial required peremptories on both sides," *id.* at 212-13, and noted that the practice of permitting both sides peremptory challenges continued when the courts of this nation were first formed, with both

6. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *U. S. Constitution*, Amend. XIV, Section 1.

the federal and state systems sharing the view that such challenges were an effective means of obtaining a fair and impartial jury. *Id.* at 214-18.

As stated earlier, *Swain* was decided in the context of a traditional Equal Protection challenge. Even in the face of such a constitutional challenge, the *Swain* Court recognized the overriding importance of the peremptory challenge in all criminal cases:

> "The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. [Citation omitted]. Although '[t]here is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory challenges,' *Stilson* v. *United States*, 250 U.S. 583, 586, nonetheless the challenge is 'one of the most important of the rights secured to the accused,' *Pointer* v. *United States*, 151 U.S. 396, 408. The denial or impairment of the right is reversible error without a showing of prejudice. [Citations omitted]. 'For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.' [Citations omitted]." 280 U.S. at 219.

The importance of the right to exercise peremptory challenges, was not limited to the defendant:

> "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that 'to perform its high function in

> the best way 'justice must satisfy the appearance of justice'.' *In re Murchison*, 349 U.S. 133, 136. Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the *voir dire* and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause. Although historically the incidence of the prosecutor's challenge has differed from that of the accused, the view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'' *Hayes* v. *Missouri*, 120 U.S. 68, 70.'' 380 U.S. at 219-20.

This recognition of the right of both the defendant and the prosecutor to exercise the challenge of a limited number of venirepersons without cause was the first step in the *Swain* Court's rejection of the Equal Protection argument. The second step was to recognize that in the circumstances of any particular case, the reasons for the exercise of such challenges need not be given:

> ''The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. [Citations omitted]. While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. [Citation omitted]. It is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures

> of another' [citations omitted] . . . . It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. [Footnote omitted]. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. [Footnotes and citations omitted]. Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried." 380 U.S. at 220-21.
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> "The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes." 380 U.S. at 222.

In concluding, the *Swain* Court reiterated that no jury in a single case was required by the Constitution to be stricken merely because of the possible use by the prosecutor of his challenges to exclude persons of a particular race. Instead, the presumption that the challenges were based on case-related reasons is overcome *only* by a showing that "the prosecutor's use of peremptory challenges [occurred] over a period of time." *Id.* at 227. The *McCray* court con-

cluded that to demonstrate this was "mission impossible." (subheadnote at 1120).

The *Swain* Court made it quite clear that *nothing* in the Constitution required a prosecutor to disclose reasons for his peremptory strikes. After *Duncan,* in 1968 applied the Sixth Amendment to the states, a long line of authority developed to the effect that *Swain* is applicable even in a Sixth Amendment context.[7]

No rational person can defend deliberate exclusion of a cognizable group from such an important public duty as

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7. Every circuit court dealing with the issue with the exception of the case of *McCray* v. *Abrams,* which is discussed in the text, has determined that the strictures of *Swain* v. *Alabama* were equally applicable in a case involving the Sixth Amendment. *See United States* v. *Canel,* 708 F.2d 894 (3d Cir.), *cert. denied,* —— U.S. ——, 104 S.Ct. 165 (1983); *United States* v. *Whitfield,* 715 F.2d 145 (4th Cir. 1983); *Prejean* v. *Blackburn,* 743 F.2d 1091 (5th Cir. 1984); *United States* v. *Clark,* 737 F.2d 679 (7th Cir. 1984); *United States* v. *Childress,* 715 F.2d 1313 (8th Cir. 1983) (*en banc*), *cert. denied,* —— U.S. ——, 104 S.Ct. 744 (1984); *Weathersby* v. *Morris,* 708 F.2d 1493 (9th Cir. 1983); *United States* v. *Jenkins,* 701 F.2d 850 (10th Cir. 1983; *United States* v. *Green,* 742 F.2d 609 (11th Cir. 1984); *see also United States* v. *Danzey,* 622 F.2d 1065 (2d Cir. 1980) (use of peremptory challenges in any particular case "denies no cognizable right"); *United States* v. *Newman,* 549 F.2d 240, 247 (2d Cir. 1977) (exclusion of jurors on the basis of race in case after case is necessary to demonstrate systematic exclusion even where the prosecutors in the case at bar challenged Blacks purposely). *Id.* at 249). However, several opinions dissenting from the denial of *certiorari* have been cited as support for the proposition that *Swain* should not be applied in the Sixth Amendment context. *See e.g., Thompson* v. *United States,* —— U.S. ——, 105 S.Ct. 443 (1985); *Williams* v. *Illinois,* —— U.S. ——, 104 S.Ct. 2364 (1984); *Gilliard* v. *Mississippi,* —— U.S. ——, 104 S.Ct. 40 (1984); *McCray* v. *New York,* —— U.S. ——, 103 S.Ct. 2438 (1983).

Three state courts have avoided application of the holding in *Swain* by finding discriminatory use of peremptory challenges to be in violation of *state* constitutional guidelines. *State* v. *Neil,* 457 So.2d 481 (Fla. 1984); *Commonwealth* v. *Soares,* 377 Mass. 461, 387 N.E.2d 499, *cert. denied,* 444 U.S. 881 (1979); *People* v. *Wheeler,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978).

that of administering the criminal law. All can agree that a prosecutor so abusing peremptory challenges is at the very least *infra dig.* and arguably unfair. However, the whole idea of a peremptory challenge is at odds with the necessity to give reasons. The transactional costs involved in litigating whether the reasons are "pretextual" will be vast and the reliability of the results uncertain. In the American tradition of the adversary system of justice it is foreseeable that on occasion the prosecutor will abuse his peremptories, and even more often, the defense will challenge the challenges.

The State of New York, opposing the *McCray* petition, conceded that the Constitution bars the use by a prosecutor of peremptory challenges to exclude potential jurors solely because of their race.[8] 750 F.2d at 1116. Nevertheless, the *McCray* court, seeing the importance of the issue and the lack of agreement among the courts on this question, examined the meaning of *Swain* and its continued vitality. 750 F.2d at 1118.

The majority in *McCray* first addressed the issue of whether decisions subsequent to *Swain* had effectively overruled it. Despite its own obvious dissatisfaction with *Swain* and criticism from commentators and more recently, from courts, the *McCray* panel found that the strictures of *Swain* still remained valid when the analysis is based only on the Equal Protection Clause. 750 F.2d at 1123-24. Still, the majority in *McCray* implies that *Swain* should have been decided differently, in light of the impossibility of showing

8. This concession by the State concerning such a significant issue as the use of peremptories by the prosecution in criminal trials has been termed by one judge to be "incomprehensible." 750 F.2d at 1135, n. 1 (Meskill, J., dissenting).

racially motivated abuse of peremptory challenges in case after case, rather than merely in the case at hand.[9]

The *McCray* court pointed out that "almost no other defendants in the nearly two decades since the *Swain* decision have met th[e] standard of proof" required under *Swain*. Rather than seeing this as evidence that *Swain* had not resulted in the wholesale exclusion of blacks from petit jury panels, as had originally been feared, *see e.g.*, Comment, *Swain* v. *Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 Va.L.Rev. 1157 (1966), the *McCray* court cited a handful of decisions where there was evidence of discriminatory use of peremptory challenges in a specific case, but no pattern, apparently perceiving those few cases as evidence that the *Swain* Court had created an insuperable bar to enforcing a conceded right. 750 F.2d at 1120-21.

Commentators have suggested however that the system itself contains an internal sanction against the abuse of peremptory challenges by exercising them in a discriminatory fashion. According to this view, one with which this Court agrees, an attorney would be foolish to waste his not unlimited challenges to exclude persons solely on the

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9. This conclusion explains the departure of the author of *McCray* from the earlier opinion in *United States* v. *Danzey*, 622 F.2d 1065, 1066 (2d Cir. 1980), in which she joined where it was held:

> "While use of peremptory challenges based on a group bias assumption *denies no cognizable legal rights "in any particular case,"* . . . a substantial issue would arise if peremptory challenges were being used consistently to exclude Blacks from service as jurors in general or in a significant category of cases. [Citations omitted]. But no relief is appropriate unless the offending pattern is sufficiently general and pervasive to support a clear inference of motivation or intent to discriminate against a particular racial or ethnic group. *See United States* v. *Newman*, 549 F.2d 240, 249-50 (2d Cir. 1977)." (Emphasis added).

basis of race, since this would render him helpless to challenge other jurors who might find it more difficult to accept that attorney's view of the case. This may well be the reason why so few cases have met the *Swain* test and, indeed, why relatively few instances of racial discrimination in jury selection have been reported. Saltzburg and Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md.L.Rev. 337, 365 (1982). Furthermore, our Circuit has held in the case of *United States* v. *Newman*, 549 F.2d 240 (2d Cir. 1977) that:

> "Blacks are the major victims of wrongdoers and it is unlikely that they hesitate to convict where the case warrants it. All of the members of this court, hearing the present case, have served more than a decade as judges of the United States District Court for the District of Connecticut. It has been our experience that Black persons, summoned and drawn for jury panels in that court, have been excellent jurors and have shown no predilection to favor or harm any group, class or kind of persons but have judged the facts on the evidence presented in court in the light of the court's charge.
>
> The right to peremptory challenges is of great importance, both to the Government and to the defendants—but mostly to the defendants, because they are personally involved in the result of the trial and for this reason usually have more of the peremptory challenges than the Government. These challenges provide one of the most effective assurances that a party will have a fair and impartial jury. If, for example, a defendant knows or has a strong suspicion that a particular venireman is hostile to him or believe the venireman has strong or militant views which would make it unlikely,

in spite of the court's instructions, that the venireman would give fair and impartial consideration to the case, and, yet the defendant does not have available sufficient evidence to prove these disqualifications on a challenge for cause, he can solve the problem with a peremptory challenge. The same considerations apply to a plaintiff or a prosecutor. Once, however, a plaintiff or prosecutor is required to submit to interrogation concerning his reasons for making a peremptory challenge, it will probably not be long before defendants will be required to do likewise. This, in all likelihood, would spell the end of peremptory challenges; and Blacks and other recognizable minority groups would thereby suffer a major loss in the removal of one of the greatest safeguards the law has provided for a fair trial." 549 F.2d at 250, n. 8.

The *McCray* court observed that the Supreme Court's statement in *Swain* that no violation of equal protection can occur because blacks and whites " 'are alike subject to being challenged without cause' [citation omitted] ignores practice." 750 F.2d at 1121. "[A]s a practical matter," said the *McCray* court, "the prosecution does not peremptorily excuse whites simply because they are whites." *Id.* This case at bar demonstrates that the *McCray* court's conclusion on this point is unfounded. In sections such as Bronx County, it is just as likely that a prosecutor will attempt to exclude whites from a jury as it is that he or she would attempt to exclude blacks.[10] And, even in areas where whites

10. In Bronx County whites constitute only a plurality of the population; about one-third, according to 1980 census figures. *See* Habeas Hearing, Ex. 1. Blacks and Hispanics total almost 64 percent. If a panel of sixty venirepersons were selected, assuming one-third or 20 of these persons were white, it would not be difficult for any attorney so disposed, to utilize his or her fifteen peremptory challenges to exclude every white venireperson selected to sit as a prospective petit juror.

are in the majority, a prosecutor, who is so disposed, might very well use his or her challenges to exclude whites solely due to their race in order to obtain a jury panel comprised of as many minority members as possible. This is likely in a case such as an arson-for-profit trial, where the crime itself impinges more heavily on the poor and minorities, a point not lost on the prosecution in this case. *See* Habeas Tr. pp. 55, 133.

After finding that *Swain* was deserving of "scathing" criticism, the *McCray* court yet found that "*Swain* is clear, direct and unequivocal," on the point that any challenge to the exercise of peremptory challenges in a particular case under the Equal Protection Clause could not be sustained. 750 F.2d at 1120-21, 1124.

According to the Second Circuit panel, however, such treatment of *Swain* as controlling authority was not required where the claim is raised pursuant to the Sixth Amendment. Instead, because each defendant in a criminal case is entitled to trial by an impartial jury comprised of a group of laypersons "representative of a cross-section of the community," 750 F.2d at 1125 (quoting *Williams* v. *Florida,* 399 U.S. 78, 100), and this requirement was made applicable to the states through the Fourteenth Amendment, 750 F.2d at 1124, the Constitution "forbids the exercise of [peremptory] challenges solely on the basis of . . . racial affiliaton." *Id.* at 1131.

Pursuant to its holding the *McCray* court fashioned a test to be applied in all instances where a criminal defendant challenged his conviction on Sixth Amendment grounds based on the prosecutor's alleged use of peremptory challenges to exclude persons from the petit jury

panel based solely on their membership in a cognizable group:

> "[I]n order to establish a prima facie violation of his right to the possibility of a fair cross section in the petit jury, the defendant must show that in his case, (1) the group alleged to be excluded is a cognizable group in the community, and (2) there is a substantial likelihood that the challenges leading to this exclusion have been made on the basis of the individual venirepersons' group affiliation rather than because of any indication of a possible inability to decide the case on the basis of the evidence presented.
>
> If the defendant establishes such a prima facie case, 'the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.' [Citations omitted] In order to rebut the defendant's showing, the prosecutor need not show a reason rising to the level of cause. There are any number of bases on which a party may believe, not unreasonably, that a prospective juror may have some slight bias that would not support a challenge for cause but that would make excusing him or her desirable. Such reasons, if they appear to be genuine, should be accepted by the court, which will bear the responsibility of assessing the genuineness of the prosecutor's response and of being alert to reasons that are pretextual. [Citations omitted]. If the court determines that the prosecution's presentation is inadequate to rebut the defendant's proof, the court should declare a mistrial and a new jury should be selected from a new panel." 750 F.2d at 1131-32.

Appendix A

Essential to the *McCray* court's analysis, which invokes the necessity for minitrials on the exercise of prosecution peremptories, were several preliminary findings. As stated earlier, the court had to reject the finding that *Swain* v. *Alabama* was applicable in the Sixth Amendment context despite its broad language which expressly proscribes judicial inquiry into a prosecutor's reasons for challenging any prospective juror and its express holding that nothing in the entire "Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." *Swain,* 380 U.S. at 222. The *McCray* majority saw itself as able to circumvent the unequivocal language of *Swain* because it did "not believe" this reference was intended to mean what it says, since *Swain* had focused on the Equal Protection Clause, not the Sixth Amendment. 750 F.2d at 1124.

This interpretation assumes that when the broad language of *Swain* was uttered on March 8, 1965 the Supreme Court did not foresee that less than three years later in *Duncan* (argued January 17, 1968 and decided May 20, 1968), it would be called upon to find that the "fair trial" requirement of the Sixth Amendment applied to the states through the Fourteenth Amendment. However, by the time *Swain* was decided, "many of the rights guaranteed by the first eight Amendments to the Constitution ha[d] been held to be protected against state action . . . by the Fourteenth Amendment," including most of the other rights secured by the Sixth Amendment. *See Duncan* v. *Louisiana, supra,* 391 U.S. at 148, and the cases cited therein in fn. 4-8.

To suppose otherwise, as does the majority in *McCray*, denigrates the scholarship of those who participated in the majority in *Swain*. Moreover, the dissent of Justice Goldberg in *Swain* is illuminating:

> "There is nothing in the Constitution of the United States which *requires the State to grant trial by jury* so long as the inviolability of the peremptory challenge is secured." 380 U.S. at 244 (Goldberg, J., dissenting) (emphasis added).

Justice Goldberg's comment was sufficient to put the entire Supreme Court on notice that its holding would apply to the Sixth Amendment right to jury trial. That the majority remained firm in its position in the face of such trenchant sarcasm is considerable evidence of the intent of that Court to adhere to its holding even on Sixth Amendment analysis.

In his dissenting opinion in *McCray*, Judge Meskill, while recognizing that the result reached by the majority was "well intentioned," called it:

> "[U]nworkable and contrary to the law of this and almost every other circuit. Until today's decision, federal appellate case law dealing with the racial makeup of juries was uniform; to establish a violation of the Constitution, the defendant had to prove a *systematic exclusion* of blacks from petit juries that extended over a number of cases. Absent such a showing, the objective existence or nonexistence of a 'proper' reason for the prosecutor's use of a peremptory challenge was irrelevant because the 'presumption in any particular case *must be* that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try

> the case before the court.' *Swain* v. *Alabama*, 380 U.S. 202, 222, 85 S.Ct. 824, 837, 13 L.Ed.2d 759 (1965)." 750 F.2d at 1135 (Meskill, J. dissenting) (emphasis in original).

Judge Meskill reminded the majority that *Swain* was not limited to a Fourteenth Amendment equal protection analysis, but was applicable to challenges based on the Sixth Amendment as well: "[W]e cannot hold that *the Constitution* requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." 750 F.2d at 1135, *quoting Swain*, 380 U.S. at 222 (emphasis in original).

The instant case illustrates clearly the practical considerations addressed by Judge Meskill as militating against the conclusion reached by the *McCray* majority. The peremptory challenge, he said, was used by each side to "ensure that her client faces a jury that at least will be unbiased and at best will be receptive to her view of the case." *Id.* at 1137. Exclusion of persons from the petit jury for this purpose is not invidious discrimination, but a process participated in by both sides. "The result of this adversarial system should be an impartial jury." *Id.* at 1137. Although the *McCray* majority might find such a system distasteful, "an attorney has not only a right but an obligation to challenge a prospective juror who *may* be biased, even if the basis of her belief is a broad generalization, which may not in fact be true." *See id.* at 1137-38.

In *McCray*, as in Roman's case, the issue was "whether a prosecutor may use peremptory challenges to exclude individual members of a group because she believes *in that particular case* they *may* be biased in favor of members of

the defendant's group." *Id.* at 1138 (emphasis in original). The dissent continued:

> "A competent prosecutor will only strike a member of the defendant's group in situations where she believes the possibility of that individual having a group bias—even if very small—is greater than the possibility of some other prospective juror having a bias. Where the group based assumption against members of the defendant's group is outweighed by some other assumption, the prosecutor will turn to the other assumptions; for instance, if a black college student is being tried in a draft registration case, the prosecutor may prefer to challenge a white social worker rather than a black veteran. By banning the use of such assumptions, the majority has severely limited the effectiveness of the peremptory challenge." *Id.* at 1138.

Our preceding discussion of the prosecutor's peremptory challenges in this case brings us clearly within the rule of *McCray* in both its aspects. *McCray* not only holds that without proof of actual bias, a defendant is entitled to a new trial if denied the "fair and undistorted chance" that the possibility that a venire representing a fair cross section of the community will be carried over to the petit jury, and that the Sixth Amendment "simply prohibits the state's systematic elimination of the possibility of such carryover" by its abuse of peremptory challenges, 750 F.2d at 1129, it also holds that the Sixth Amendment "forbids the exercise of [peremptory] challenges to excuse jurors solely on the basis of their racial affiliation." 750 F.2d at 1131.

Before leaving the topic, we note agreement with the condemnation by the Court in *McCray* of a prosecutor who ex-

ercises challenges based solely on his or her own personal bigotry or some perceived stereotype concerning a cognizable group, as opposed to case-related reasoning. The fact that such persons were excused due to glaring and unfounded generalizations based on factors such as race is certainly pernicious without regard to the facts of the case. More pernicious still is to permit an individual, convicted of conspiracy to commit arson by blowing up a building within the City of New York, to overturn his conviction merely due to the invidious actions of a prosecutor in excluding a cognizable group from a petit jury concerning which there is no reason to believe that those trial jurors finally selected were not fair and impartial, simply because white jurors had been systematically excluded. Their verdict should not be rendered void merely because of what the prosecutor did. To do so, and to import a number of mini-trials into the jury selection process does a disservice to a system which has served society well for centuries. Nevertheless, our outcome is bound by *McCray*.

Claim of Ineffective Assistance of Counsel

Not content with having presented this Court with a case clearly within *McCray*, petitioner insists on obscuring his good claim by insisting on a second claim, essentially frivolous, phrased in terms of "ineffective assistance of counsel," the usual contention of losers. The ineffective assistance claim, as is so often the case, arises out of a trial tactic concerning the Brooks tapes. There were four such tapes made. The prosecutor played one and part of another to the jury. One of the tapes was

held inadmissible by the trial court when offered by defense counsel. (*See* Trial Tr. at 418-50). This ruling was ostensibly based on the fact that defense counsel attempted to introduce the tape during the prosecution's case. The stated purpose of the offer was to impeach the witness Brooks, by showing there was no conversation on the tape between Brooks and defendant Roman. This fact was stipulated by the prosecutor. Thus, the only remaining purpose of the offer was apparently substantive. It was within the trial judge's discretion to conclude that the problem was not whether the tape could come in, but "when does it come in." (Trial Tr. at 445). Defense counsel did not attempt to introduce the tape of July 4, 1980 into evidence, nor did they offer the balance of another tape played by the prosecutor only in part. (Trial Tr. at 1548).

Petitioner now asserts that the tapes not admitted into evidence were exculpatory and the failure of defense counsel to obtain their admission constituted ineffective assistance of counsel. The argument is that the tapes not played would demonstrate that no conspiracy existed.

A high standard must be met to support an ineffective assistance claim:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of

> a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland* v. *Washington,* 52 U.S.L.W. 4565 (May 14, 1984). *See also United States* v. *Cronic,* 52 U.S.L.W. 4560 (May 14, 1984).

In the context of this case, failure to reoffer the tapes appears to have been a product of a tactical decision which ought not to be tested by hindsight. If wrong, it was not so deficient as to rise to the *Strickland* standard. Furthermore, it cannot be said with certainty that the omitted tapes are exculpatory. At best, they seem ambiguous. At worst, their introduction might have been damaging. Defense counsel could and did cross-examine Brooks at length, posing several questions pertaining to the contents of tape recordings not played.

In conclusion, the failure of counsel to introduce all the tapes into evidence did not cause such a breakdown in the adversary process as would render the result of trial unreliable. The actions of counsel did not prejudice the defendant in any way, and, even assuming prejudice, counsel's representation was reasonable under the circumstances of this case. *See Strickland, supra,* at 4573-74.

Conclusion

The foregoing constitutes the findings of fact and conclusions of law of this Court following a hearing. The petition is granted and the writ shall issue unless the state shall re-try petitioner before an impartial, validly selected

jury within 120 days following appellate finality. Pending such retrial, petitioner is continued on his existing bail.

Settle a judgment on five (5) days notice.

So Ordered.

Dated: New York, New York
May 15, 1985

/s/ CHARLES L. BRIEANT

CHARLES L. BRIEANT
U. S. D. J.

Appendix A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JUDGMENT

85 Civ. 763 (CLB)

MICHAEL ROMAN,

Petitioner,

against

ROBERT ABRAMS, Attorney General of the State of New York,

Respondent.

Petitioner having petitioned this Court for a writ of Habeas Corpus, and upon the papers of Mr. Lawrence Mark Stern Esq., attorney for petitioner, and Allen H. Saperstein Esq., attorney for respondent, and after an evidentiary hearing having been conducted in this Court, and post-hearing memorandum of law having been filed by both Mr. Stern for petitioner and Mr. Saperstein for respondent, and all the materials having been considered, and due deliberation having been had, it is HEREBY ADJUDGED, ORDERED AND DECREED THEREON that the petition is granted and the writ shall issue unless the State shall re-try petitioner before an impartial, validly selected jury within 120 days following appellate finality, and petitioner is continued on his existing bail arrangements and may file a notice of cross-appeal *in forma pauperis.*

/s/ HON. CHARLES L. BRIEANT

HON. CHARLES L. BRIEANT
JUDGE, UNITED STATES DISTRICT COURT

DATED: May 28, 1985
New York, New York

APPENDIX B

Order of Affirmance on Appeal from Judgment, New York State Supreme Court, Appellate Division

21184

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 6, 1984.

Present—Hon. Joseph P. Sullivan, Justice Presiding
David Ross
John Carro
Max Bloom
Bentley Kassal, Justices.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

MICHAEL ROMAN,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Eugene Nardelli, J.), rendered on December 18, 1981, convicting defendant of conspiracy in the

second degree, and said appeal having been argued by Lawrence Mark Stern of counsel for the appellant, and by Allen H. Saperstein of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. The case is remitted to the Supreme Court, Bronx County, for further proceedings pursuant to CPL 460.50(5).

ENTER:

JOSEPH J. LUCCHI
Clerk.

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

APPENDIX C

Certificate Denying Leave, New York Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. SOL WACHTLER, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

MICHAEL ROMAN

I, SOL WACHTLER, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
January 28, 1985.

/s/ SOL WACHTLER

SOL WACHTLER
Chief Judge

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* Description of Order: Judgment, Supreme Court, Bronx, December 18, 1981; affirmed by Appellate Division, First Department, December 6, 1984.

APPENDIX D

Memorandum Decision, United States District Court for the Southern District of New York (Goettel, J.)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

85 Civ. 1263 (GLG)

HAROLD SCHREIBER,

Petitioner,

against

DOMINICK R. SALAMACK, Superintendent, Edgecombe Correctional Facility,

Respondent.

The petitioner moves for an order admitting him to bail pending a determination of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On November 21, 1981, the petitioner was convicted of conspiracy to commit arson in the fourth degree, after a jury trial in the Supreme Court, Bronx County. He was thereafter sentenced to an indeterminate term of imprisonment of two to four years, which he is still serving.

Granting of bail prior to the hearing of a habeas corpus petition is unusual—this Court can recall it occurring on only one or two occasions out of the many hundreds of

habeas corpus applications that have come before the Court over the years. It is clear that the considerations on granting bail are the merits of the petition and the risk of flight.

The petitioner sets forth two grounds for the granting of his petition. The first is that the evidence at trial was legally insufficient to enable a rational trier of facts to have found him guilty beyond a reasonable doubt. *Jackson* v. *Virginia,* 443 U.S. 307 (1979). The second ground is that the petitioner's sixth amendment rights to a fair trial by an impartial jury were violated when the prosecutor used many peremptory challenges to systematically exclude white persons from the jury. The significance of this, according to the petitioner, is that, in his words,

> Petitioner maintains that it was the State's calculated effort to obtain as black and Hispanic a jury as possible because petitioner and his co-defendant were white, the State's main witness was black and the area in which the alleged arson conspiracy was to have occured [*sic*] was bl[illegible], in addition to the complexities involved in understanding tedious business practices common to day-to-day transactions of same in New York City. In short, petitioner submits that because the State's case was weak, flimsy and circumstantial, a jury of certain particularity would have to be selected so that instead of the case being heard on its merits, it would be heard on emotions relating to the jurors' knowledge of and experience with arson-for-profit schemes in the South Bronx, as well as any other prejudices which could have been exhibited towards petitioner and his co-defendant, as a direct result of the color of their skin.

Notice of Motion for Admission to Bail at 2-3.

Appendix D

The respondent's opposing papers concentrate primarily on the risks involved in admitting the petitioner to bail and his purported delay in bringing on the writ.[1] In a single paragraph, the opposing papers comment that there is little chance in succeeding in federal court on the *Jackson* v. *Virginia* grounds and that there are "substantial procedural obstacles" to succeeding on the jury selection issue.

With respect to the sufficiency of the evidence, the petitioner argues that no rational jury could have concluded that he had a motive to have his building burned when the insurance payable was less than what he claims the value of the building to be. We certainly do not see that as being a presumptively successful argument.

The jury selection claim rests upon the Second Circuit's recent decision in *McCray* v. *Abrams,* No. 84-2026 (2d Cir. Dec. 4, 1984). In that case, the Second Circuit affirmed the granting of a petition. McCray, the petitioner, was charged in state court with robbery in the first and second degrees. He is black and the victim was white. His first trial was held before a jury comprised of nine white jurors and three black jurors. The trial ended in a hung jury, 9 to 3 for conviction, with either two or all three of the black jurors holding out for acquittal. At a retrial with the same Assistant District Attorney

1. We do not understand the reason for this approach by the respondent, but it may have something to do with the fact that Judge Brieant granted bail to a co-defendant, who initiated his petition in federal court prior to commencing service of his state sentence. Since there was no written opinion on that motion and the petition has not yet been decided, we do not have the benefit of Judge Brieant's thinking.

prosecuting, the State exercised most of its peremptory challenges (the State got fifteen, as did the defendant) to challenge black and hispanic jurors. The case went to trial with, at most, only an alternate juror who was black or hispanic. The defendant was convicted. The Appellate Division affirmed without opinion, the New York Court of Appeals affirmed 4-3, and the Supreme Court of the United States denied a petition for certiorari 7-2.

The defendant then filed a federal habeas corpus petition in the Eastern District of New York. The State, surprisingly, agreed that the discriminatory use of peremptory challenges violates a defendant's fundamental rights, but argued that it had not done so in this case and that, in any event, an evidentiary hearing should be held. The district court, per Nickerson, J., granted the petition and the Court of Appeals affirmed 2-1.

A great part of the majority opinion is devoted to attempting to distinguish the Supreme Court's decision in *Swain* v. *Alabama*, 380 U.S. 202 (1965), upon which the New York Court of Appeals had relied in this case to conclude that it negated any constitutional right in this situation because "[t]he benefits of requiring the prosecutor to justify the exercise of certain peremptory challenges are simply outweighed by the damage [to] a system of jury selection which best serves to guarantee a fair and impartial jury." 57 N.Y.2d at 549. The decision holds, in effect, that *Swain* is no longer good law. After commenting that there is a "rarity of wholesale challenges to white venirepersons," *McCray* v. *Abrams*, No. 84-2026 (2d Cir. Dec. 4, 1984), slip op. at 6985, the majority opinion continues that the premise of *Swain* serves "to perpetuate

an invidious proposition of racial inferiority" and concludes, "How unfortunate that the invidious proposition has been allowed to flourish in the administration of justice." *Id.*

The opinion then analyzes the sixth amendment considerations of trial by an impartial jury. It acknowledges that a defendant has no right to a petit jury of a particular composition, but concludes that the *Swain* opinion created a "myth that peremptory challenges are sacrosanct." *Id.* at 7003. It found the use of peremptory challenges by a prosecutor to be an exclusion of jurors by systematic action of the state, and construed the sixth amendment to require the court "to scrutin[ize] under the Sixth Amendment the prosecution's use of its peremptory challenges on the basis of its actions in his own particular case." *Id.* at 7005. The opinion then notes:

> Further the notions that all persons who share an attribute, such as the same skin color, will *ipso facto* view matters in the same way, and that minority groups are less able than whites to decide the case solely on the basis of the evidence, are both fallacious and pernicious. . . . Any notion that white persons can be objective in viewing a case on its merits and that blacks *qua* blacks cannot, is particularly objectionable.

Id. at 7006-07. Consequently, the court concluded that the sixth amendment forbids peremptory challenges to excuse jurors solely on the basis of their race.

While logic might dictate that the same sort of considerations would be applicable to the challenging of white jurors when there is a white defendant, such was clearly

not the intention of that decision. Indeed, the majority noted that there was no claim that this ever occurred.[2] We see no indication in that decision that the court intended reciprocal treatment for white defendants, since the opinion is overwhelmingly concerned with the rights of minorities.

Although we reserve final decision pending hearing the merits of the petition, the likelihood of success is not so great as to warrant the granting of bail at this time. Consequently, the motion is denied.

SO ORDERED.

Dated: New York, N.Y.
April 22, 1985

/s/ GERARD L. GOETTEL

GERARD L. GOETTEL
U.S.D.J.

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2. It probably cannot occur as the result of prosecutorial action in a federal case, since the prosecution gets only six of the sixteen peremptory challenges and lacks the ability to accomplish that, assuming that the venire is predominently white. Defense counsel can control the racial make up of a jury with his larger number of challenges. Indeed, in cases with minority defendants, it is not uncommon to see juries containing mostly minority members. In the state system, however, the prosecution apparently gets the same number of challenges as the defense and, conceivably, could obtain a predominantly black jury, as is claimed here.

APPENDIX E

Endorsement, United States District Court for the Southern District of New York (Goettel, J.)

ENDORSEMENT

HAROLD SCHREIBER v. DOMINICK R. SALAMACK,
85 Civ. 1263 (GLG)

The plaintiff applies for the following alternative relief:

1. The adoption of Judge Brieant's May 15, 1985, decision in *Roman* v. *Abrams,* 83 Civ. 763; or

2. The transfer of the petition to Judge Brieant as a related matter; or

3. The reconsideration of this Court's Memorandum Decision of April 22, 1985.

All forms of alternative relief requested are denied. As the application notes, this Court's Memorandum Decision of April 22, 1985, arrives at a conclusion contrary to Judge Brieant's decision in *Roman* v. *Abrams.* My decision preceded Judge Brieant's. (His opinion does not cite or consider my contrary decision.) There is no reason, under these circumstances, for me to defer to his opinion, much as I respect his legal acumen.

The request to transfer as related would have been appropriate prior to either decision, in which event Judge Brieant might have agreed to accept both matters. In light of the differing opinions expressed by us, it would not be appropriate to refer it as a related matter at this time.

Appendix E

The motion to reconsider the earlier decision (which concerned only bail pending determination of the petition for a writ of habeas corpus) is also denied. The respondent has been directed to file his opposition shortly. At that time, this Court will take into account Judge Brieant's decision. Should there be further delay in the respondent's reply, the Court will reconsider the bail request on that basis alone.

SO ORDERED.

Dated: New York, N.Y.
June 10, 1985

/s/ GERARD L. GOETTEL

GERARD L. GOETTEL
U.S.D.J.

APPENDIX F

Petition for Writ of Habeas Corpus

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

85 Civ. 0763

JUDGE BRIEANT

MICHAEL ROMAN,

Petitioner,

against

ROBERT ABRAMS, Attorney General of the State of New York,

Respondent.

The petition of MICHAEL ROMAN respectfully alleges:

1. He is presently restrained of his liberty by Robert Abrams, the Attorney General of the State of New York, pursuant to the judgment of conviction entered against him in the Supreme Court, Bronx County (Nardelli, J.) on December 18, 1981 convicting him after a jury trial of conspiracy in the fourth degree and sentencing him as a second felony offender to a term of imprisonment of two to four years.

2. Following entry of that judgment petitioner was permitted to remain at liberty on bail pending the disposi-

tion of an appeal to the Appellate Division, First Department. On December 6, 1984 that Court affirmed the conviction. A copy of the order of affirmance is annexed hereto and marked Exhibit A. Petitioner then sought leave to appeal to the New York Court of Appeals. On January 28, 1985 the Court denied the application, informing counsel by telephone that the application was denied that day.

3. Petitioner now respectfully prays this Court for the issuance of writ of habeas corpus pursuant to 28 USC 2254. The writ should issue because the judgment of conviction was obtained in violation of a) Petitioner's rights to the effective assistance of counsel, to present evidence in support of his defense and a fair trial under the Sixth Amendment to the United States Constitution; b) Petitioner's rights to due process and equal protection of the laws under the Fifth, Sixth and Fourteenth Amendment to the United States Constitution.

4. The facts underlying these claims are fully set forth in the accompanying memorandum of law and are founded upon the trial record which will be supplied to this Court upon request. Briefly summarized here, the facts are as follows:

On July 3, 1980, one Ernest Brooks was arrested and charged with burglary. Because of his extensive criminal record, Brooks faced substantial penalties. He therefore suggested to the arresting officers that in return for leniency he would give them information about a conspiracy, of which he was a part, to blow up a building in the South

Bronx area. According to Brooks, the explosion was to take place the next day, July 4th. The officers accepted the offer.

The following day Brooks went to the Hunts Point Taxi Exchange, located at 1201 Oak Point Avenue, in the Bronx, carrying a portable radio/recorder and had a conversation with Petitioner Michael Roman, an employee at the Exchange. Brooks recorded the conversation. During the next month Brooks, wearing recording devices supplied by the offices of the Bronx District Attorney's squad, returned to the Exchange and had three other conversations with Michael Roman, each of which were recorded. In August, 1980, Roman and the owner of the subject building, Harold Schreiber, were arrested and charged with conspiracy in the first and second degrees. Both were ultimately convicted after a jury trial of conspiracy in the fourth degree.

As the prosecutor argued to the jury, "it is not through the words of Preacher Brooks that I ask you and will ask you to convict Michael Roman and Harold Schreiber, but it is through the words of Michael Roman himself". (1443; 1448). However, the prosecution introduced only selected portions of one conversation. Two other conversations, which defense counsel claimed were exculpatory because they demonstrated petitioner's lack of criminal intent, were never heard by the jury. In spite of counsel recognizing and claiming, on the record, the exculpatory value of those conversations, he failed to introduce them into evidence. This, Petitioner contends, amounted to ineffective assistance of counsel and so affected the fairness and reliability of the fact-finding process as to render the conviction unconstitutional.

Appendix F

During the first round of peremptory challenges, the prosecutor conceded that he had exclusively excused four whites and two light-skinned hispanics. The defendant immediately objected that this was a systematic racially directed criterion to obtain as black a jury as possible because the defendants were white, the prosecution's chief witness was black, and the community in which the arson allegedly was to take place was black. Indeed, during summation at the end of the trial, the prosecutor inflamed community passions by referring to the jurors' familiarity with the problem of arson for profit. When, in two subsequent rounds, the prosecutor challenged three more and two more whites, respectively, the defendants again objected and moved for a mistrial. The judge ordered the prosecutor to state his reasons. He immediately withdrew one of the two challenges in the latter round, and explained that the other was based on a difference in age and life-style between the juror and the prosecutor's chief witness. No reasons were offered for the nine prior challenges of light-skinned people.

In the final round, the prosecutor challenged another white person, and offered the excuse that she was a computer programmer. Defendants again objected that their rights to a fair trial and due process of law had been violated by the prosecutor's challenge. The objection was noted by the trial court but no finding or ruling with respect thereto was made. Petitioner asserts, as he did before the New York Courts, that the prosecutor's jury challenges were racially motivated and thus violative of Petitioner's Fifth Amendment rights. *McCray* v. *Abrams*, —— F. 2d —— (2d Cir.), Dec. 4, 1984, slip op. 6967.

5. The trial record and as well as the tape recordings of Petitioner's conversations will be supplied to this Court upon request.

WHEREFORE, Petitioner respectfully prays this Court for a writ of habeas corpus commanding Petitioner's release from custody unless he is granted a new trial, and for such other and further relief as the Court deems just and proper.

/s/

MICHAEL ROMAN

VERIFICATION

STATE OF NEW YORK
COUNTY OF NEW YORK

MICHAEL ROMAN, being duly sworn, deposes and says:

1. That he is the Petitioner in the foregoing Petition.

2. That he has read the foregoing Petition, knows the contents thereof, and knows it to be true and upon personal knowledge, except as to those matters therein stated to be upon information and belief, and as to those matters he believes it to be true.

/s/

MICHAEL ROMAN

APPENDIX G

Transcript, Jury Selection, New York State Supreme Court, County of Bronx

* * *

Mr. Levin: Is Your Honor asking me to state my reasons?

The Court: Yes.

Mr. Levin: I will withdraw one of my peremptory challenges and I will ask juror number twelve be reinstated. That is Sonia Madison.

The Court: Are you stating the reason for number eleven?

Mr. Levin: I don't feel she can be fair and impartial to my witnesses.

The Court: Based on what?

Mr. Levin: Based on the fact in terms of age distinction, in terms of her lifestyle as opposed to the People's main witness' lifestyle which has already been made known to the Court, has a long history of criminal involvement.

Mr. Richmond: Are you suggesting counsel that because persons are black, therefore they would have an affiinity toward your client's lifestyle?

Mr. Levin: I believe I stated my explanation, Judge. That is all you required me to do.

Mr. Raskin: Your Honor, the record should indicate—

Prospective Juror: I start a new job as of two weeks from now doing computer operation.

The Court: Are you employed at present?

Prospective Juror: No, not yet.

The Court: This case is not going to interfere with your new job?

Prospective Juror: No, sir.

The Court: Are you married?

Prospective Juror: No.

The Court: How long have you been a resident of the Bronx?

Prospective Juror: All my life.

The Court: Now, do you live with your parents?

Prospective Juror: My mother.

The Court: Is she a housewife?

Prospective Juror: She just retired last month.

The Court: What did she do?

Prospective Juror: Medical technology.

The Court: Brother and sister?

Prospective Juror: No, just myself.

The Court: Just yourself and your mom at this time. All right, Mr. Levin.

Mr. Levin: (Whereupon, the Assistant District Attorney, Mr. Levin, voir diring prospective juror off the record.)

Mr. Levin: Thank you very much.

Mr. Richmond: (Whereupon, Mr. Richmond voir diring prospective juror off the record.)

Mr. Richmond: No further questions.

Mr. Raskin: (Whereupon, Mr. Raskin voir diring prospective juror off the record.)

Mr. Raskin: Thank you.

(Whereupon, the following proceedings take place in the Court's robing room outside the pres-

ence of the jury between the Court, Mr. Raskin, Mr. Levin, Mr. Richmond and defendants.)

Court Clerk: Let the record indicate these proceedings are outside the presence of the jury.

The Court: People, any for cause?

Mr. Levin: No. Can I think about this. I will confer with myself.

I challenge him, peremptory challenge.

Mr. Richmond: Let the record show that this is a caucasian.

Mr. Levin: I—

Mr. Raskin: I would like Mr. Levin to show cause why he is challenging this white juror. Again white caucasian.

The Court: All right.

Mr. Levin: This is—does this rule apply everytime I challenge a juror if he is white.

The Court: Apparently.

Mr. Levin: Apparently. Is this your rule?

The Court: It is my ruling and what I was saying apparently you don't understand that the challenge they are raising applies to the prosecutor and it does not apply to the defense.

Now, make your explanation for the record. That is all. They're preserving their record. They have a right to do that.

Mr. Levin: I understand. It is what—is it if it is a—continued in view of the fact that it happened—

Appendix G

The Court: They excused two whites and they have given their reasons for the record.

Mr. Levin: I was going to say there are already three whites.

The Court: It will continue so long as they have an objection.

Mr. Levin: So long as I challenge caucasians.

The Court: It is their right to make the record. That is all.

Mr. Levin: I believe based on his background.

The Court: That is all. All right. As a computer operator.

Mr. Levin: Right.

Mr. Richmond: For the record, I would like to raise the observation this is a country made up of approximately one million four hundred thousand people, half of which are white. I am not suggesting that in view of the fact that both defendants are white, therefore the jury must be entirely white, but there should be a cross section of that population representative upon that jury, a reasonable cross section.

When the District Attorney makes every effort to make that cross section not representative to the extent of systematically excluding whites, that is a violation of the defendants constitutional rights to a fair trial under the Fourth and Fifth and Eighth Amendments of the Constitution which are violated.

The Court: Start with fourteen.

Mr. Richmond: Fourth, Fifth, and Fourteenth.

The Court: I'm not making any ruling. You have a right to preserve your record and under the

• • •

APPENDIX H

Transcript, Habeas Hearing, United States District Court for the Southern District of New York

* * *

Levin—direct

The Witness: I am going by what—

The Court: You can't tell from memory whether Mr. Hager is white or black?

The Witness: No, I can't tell.

The Court: Let's go through the next challenge?

The Witness: The next challenge is Mr. Richard Hahn. He was in Manhattan College and he wasn't married and he was involved in electronics and I felt that that was too technical a background for the type of juror I wanted in this case.

Q. Will you explain that a little bit more. A. Well, just generally, some prosecutors feel that people who deal in sciences or accountants or in highly technical industries have a scientific standard, a scientific standard that they just cannot leave out the door when they are on a jury.

Now, the standard, obviously, is beyond a reasonable doubt and I felt a person with this type of background, even though he might say, yes, I could apply the reasonable doubt standard, would have a tendency to require a scientific or mathematical certainty standard.

Q. You felt that was the case in this case? A. That is correct.

Q. Could you explain to the judge a little bit exactly what the case was about?

* * *

her other than overall this was a first round. I had 15 challenges. I used six. It is usually my custom in the 50 or 60 jury trials that I have had to challenge between 5 and 7 automatically on the first round.

I can't independently say why I excluded her. I could give you my feelings about why I may have excluded her, but I can't document that. If your Honor would care to know my feelings, I would—

The Court: Finish with the exhibit and then counsel can sit down. So let's take the next one on the exhibit, which I understand is number 9. What does it say under that juror?

The Witness: Camille Vascoggia. Her nephew was in the police department. She's a bookkeeper and that is all I can make out.

I challenged her—

The Court: You are unable to read the rest of your writing?

The Witness: I cannot read my writing.

Again being a bookkeeper, I would challenge her as I challenged Mr. Hahn based on the fact that she is dealing with mathematical certainties and may not be able to readily accept a reasonable doubt standard.

In addition, she had a nephew on the police department. Ordinarily while a prosecutor may want someone who is connected to the police in some way, in this case due to the type of informant I had, who

had a very extensive record, I felt that people who were too law and order oriented could not accept the type of complainant or informant that I was going to base my case on.

The Court: Number 11 I believe is next. What does it say under 11 to the extent you can read it?

The Witness: It says Linda Rosario. She was assaulted. Her children were assaulted by black guy. Robbed with a weapon. She reported it to the police.

I challenged her because this information that I had mentioned was black and I felt that she would just not be able to accept his testimony right off the bat.

The Court: Where does it say "black guy" there?

The Witness: Right here.

The Court: What else does it say?

The Witness: It says assaulted, children assaulted, black guy. Kids assaulted by Spanish guy, robbed, weapon used, reported to police.

Q. What type of criminal record, if any, did your informant have?

The Court: Won't you let him finish with this and you can bring out all those facts. If I could read the document, I wouldn't be doing it this way. I think that is all on this first round, isn't it?

* * *

The Court: What is the name?

Appendix H

The Witness: Ethel Devane.

The Court: She was challenged because she worked for the telephone company?

The Witness: You have to understand, your Honor, that aside from what is down on the paper, during voir dire, and I have an extensive voir dire, sometimes it will go an hour to two hours a round, decreasing after the first round, I feel I have a very good idea of the type of person I wanted on the jury and just in plain, ordinary language I feel some people may be too soft from the prosecutor's point of vi[illegible] or some people may be too harsh, some may not be a convicting type.

The Court: Are we finished with this exhibit?

Mr. Shepherd: For round 6, yes.

Mr. Stern: I didn't see the place where Ethel Devane was, your Honor.

Thank you.

Q. According to page 136 of the transcript on the 7th round Mr. Levin challenged the only juror who had been seated on that round, Mr. Peter Cross. A. Mr. Peter Cross, he was a victim of a crime, didn't report it to the police. He was a computer operator. He lives with his mother. I can't make out the last thing. I challenged this individual for two reasons.

Actually, I remember this one actually independently. First of all, being in computers he is highly technical and again I felt he would have trouble accepting the reasonable doubt standard.

Appendix H

However, on the defense attorney's voir dire, Mr. Richman, in my mind scored points with this individual are by saying the following:

He said, in your business, Mr. Cross, there is a term when information goes into the computer and when information comes out of the computer and what's that term and Mr. Cross said, when you put information in it is called garbage in and when it comes out it is called garbage out and Mr. Richman followed it up by actually demeaning the prosecutor's case by saying and, so, if you hear any garbage coming from the prosecutor's side, you will know what to do with this case.

Everyone laughed and they thought it was a big joke and I just felt that my case was so demeaned or denigrated by the defense attorney that I could never use this person as a prospective juror.

> The Court: Everybody else on the panel heard that same interplay with Mr. Richman?
>
> The Witness: I can't—
>
> The Court: Were they individually examined?
>
> The Witness: They were examined individually but I don't know if the entire panel was there during this round. They might have excused the first 10 or 11, so I don't know exactly how many were left, but there were still people in the audience and they all laughed, so I felt he scored too well with him and I just couldn't use him.
>
> Mr. Shepherd: I believe that concludes the exhibit, your Honor.

The Court: All right, would you resume your chair, please, Mr. Stern.

You may complete the direct examination and then we will take a recess so they can study the exhibit.

Mr. Shepherd: Yes, your Honor.

Q. Mr. Levin, what type of a jury were you trying to pick in this case? A. A jury that in my view could call the shots in laymen's terms, a jury that wasn't too intellectual that may get caught up on all sorts of perhaps irrelevancies and come up with a million different reasons why not to convict, and I didn't want a jury that wasn't too uninformed.

I was looking for a jury that would call the shots and be informed about the arson situation in the Bronx. Maybe a Daily News reader, maybe a Post reader, maybe not necessarily a New York Times reader or a Time Magazine reader. An average blue collar type.

In addition, I had a problem and that was the informant was a person who had an extensive record, was a minority, a black man.

Q. Do you recall—

The Court: Would you let him finish his answer, please.

A. And wasn't very bright. So ordinarily when I would have, as I indicated before, people that had police orientations or relatives or sons or brothers or uncles in the police department or the fire department, that would appear at first glance as a typical prosecution witness may

not have suited me for this type of case because they may not have listened to this man, which was my concern.

That about sums up the general type of juror I was looking for.

Q. Do you recall what the record of your informant was, the criminal record? A. He had to have approximately—actually misdemeanors at that time, but I think he was arrested 20 or 30 times for burglaries and even though some of the charges were felonies, they were pled down, but plainly he was a commercial burglar.

> The Court: When you say "commercial burglar", he burglarized commercial properties or that was his livelihood?
>
> The Witness: That is correct. That was basically his livelihood, burglarizing commercial property in the Hunts Point section. Assaultive type, things of that nature. You know, violent. I guess you could characterize it as not the most violent but violent enough to have people not even listen to who he is.

Q. In round number 1 when you challenged Tina Martinez, you testified earlier—

> The Court: What he testified earlier I heard. Just frame your next question.

Q. Did your challenge for her have anything to do with your informant and, if so, what? A. Well, as I indicated, she was a victim of a crime. Now, that doesn't mean everybody on that panel who was a victim of a crime was chal-

lenged by me. As I indicated before, in sizing up the type of person I want, I have to generally say is this person prosecutorial or does this person have the gumption or the "chutzpah" to convict and speaking to people you get a feeling as to whether they will have the ability to convict.

Q. Would that type of reasoning pervade all of the challenges that you had for people who were prior victims of crimes? A. Well, generally yes. You have to take each juror independently in sizing them up, to weigh—well, this person yes, this person may be a convicting type.

On the other hand, this person is a victim of a crime. Will that person be so generally turned off to your witness that you are going to lose right off the bat? Is this person a leader? Is this person a follower?

Sometimes you may have a person who was a victim of a crime and may just be middle of the road and if you feel that you could convince some of the so-called stronger members of the panel, that that person will just follow along.

> Mr. Stern: Your Honor, I am going to object and move to strike this testimony. It is apparently a generalized statement about—
>
> The Court: He can be cross-examined when your turn comes. Your motion is denied.

Q. Mr. Levin, the jurors that you indicated you challenged because you felt they were too intellectual, would you explain that a little more regarding your informant? A. Well, he is a street person. He was a street person. Sometimes people in the so-called ivory towers just can't relate to a street person. You like to get jurors maybe

that have come up through the ghetto, maybe jurors that would relate to this type of person, jurors that might react maybe emotionally, vociferously, jurors that might just react to the evidence and say, yes, this person is guilty.

Sometimes, you know, it has been said you put 12 lawyers together, you never get an agreement. That type of thing, you know. You put 12 college educated people with PhD's on the jury, they could be debating the case for three weeks, you know. So I tried to steer away from that type of juror.

Q. Mr. Levin, during the jury selection process, do you recall peremptorily challenging any blacks? A. Well, based on my notes—

The Court: Just yes or no?

A. You mean independently as I sit here?

Q. Yes. A. Independently as I sit here, I don't recall the color of anybody I challenged. It is only through my notes I pieced that together.

The Court: Where are they? The notes that you read to us, did it say anything about the race of the person challenged?

The Witness: Only through the voir dire minutes that were taken and based on what counsel and I were arguing over in the robing room that I then looked back and I could see who is white and who is black, but that's obviously not a reason why I challenged anybody based on their color. I have, as I stated, my reasons why certain people were challenged.

Q. Do you feel that during the jury selection process you peremptorily challenged blacks? A. No. Maybe I didn't understand you.

Q. During the 7 or 8 rounds of the jury selection process, do you feel based on your review of your notes and the voir dire transcripts, do you feel that you peremptorily challenged blacks? A. Yes.

Q. Do you feel that you peremptorily challenged—

> Mr. Stern: Objection to what he felt, your Honor.
>
> The Court: No, I will take it. Overruled. When he says "felt" he means "believed".
>
> Mr. Stern: Either he has a recollection or he doesn't.
>
> The Court: That is a matter for cross-examination.

Q. Do you recall whether or not you challenged any blacks?

> The Court: He has told us a moment or two ago that but for his reading of the transcript, he does not recall independently and the exhibit does not indicate to him any part of it that he can read the race characteristics of the jurors. So that has been covered, hasn't it?

Q. Do you believe that you challenged any Hispanics? A. Yes.

Q. Do you believe that you challenged any whites? A. Yes.

Q. Did you challenge any of those groups because of their racial affiinity to that group? A. No.

Mr. Stern: Objection, your Honor. If he recalls.

The Court: All right, if he recalls.

Q. If you recall. A. No, it is just not a standard that I ever would use. The answer is emphatically no.

Q. In this particular—withdrawn.

Based on your review of your notes and the transcripts, do you recall whether you left any whites on the panel, in other words, available whites that you did not peremptorily challenge? A. Yes.

Q. Do you recall whether there were any Hispanics on the panel that you did not peremptorily challenge? A. Yes.

Q. Based on your review of your notes and the trial transcripts, do you have an objection as to what the racial makeup of the final jury panel or the final 12 jurors was? A. Yes, there were three whites, three Hispanics and six blacks.

The Court: How many unused challenges did you have of a peremptory nature when you accepted the jury?

The Witness: I used 12, so I had three peremptory challenges left.

Q. After reviewing your notes, and the transcripts, do you recall whether the defense peremptorily challenged any whites? A. Yes they did, at least on two occasions, if not up to four occasions.

The Court: What is the significance of that?

Mr. Shepherd: Your Honor, I feel it is important—

The Court: It is irrelevant to me because what the defendants do is not state action. This McCray case does not touch upon the defendant's exercise of peremptories and the problem it presents is a very real one because if defense counsel were asked why did you challenge juror number 2, for example, defense counsel might be in a position of having to say my client directed me to or my client asked me to and if he was asked anything further, he would have to remain silent because that might be an . . .

* * *

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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-138 **85-138**

ROBERT ABRAMS, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Petitioner,

-against-

MICHAEL ROMAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a District Court's finding of fact that "the prosecutor used his peremptory challenges deliberately to effect the invidious purpose of eliminating or reducing the number or proportion of white jurors" who would sit in a criminal case renders the conviction inconsistent with the defendant's rights to a fair trial by a jury drawn from a representative cross-section of the community, and to due process and equal protection of the laws as guaranteed by the Fifth, Sixth and Fourteenth Amendments?

2. Whether this Court's consideration of Batson v. Kentucky, No. 84-6263, which, unlike this case, does not involve a finding of fact of deliberate and invidious elimination of jurors on the basis of race, requires the granting of certiorari in this case prior to a decision by the Court of Appeals for the Second Circuit?

3. Whether this Court's holding in Swain v. Alabama, 380 U.S. 202 (1965), forbids a finding that a prosecutor's use of peremptory challenges to exclude white jurors in a criminal case violates equal protection absent statistical evidence establishing a pattern and practice of such exclusions and, if so, should that holding now be modified to prohibit intentional race discrimination?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	18
I. THE DISTRICT COURT'S FINDING OF FACT THAT "THE PROSECUTOR USED HIS PEREMPTORY CHALLENGES DELIBERATELY TO EFFECT THE INVIDIOUS PURPOSE OF ELIMINATING OR REDUCING THE NUMBER OR PROPORTION OF WHITE JURORS" RENDERS THE CONVICTION INCONSISTENT WITH THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AND DOES NOT REQUIRE CONSIDERATION BY THIS COURT PRIOR TO REVIEW BY THE COURT OF APPEALS	18
CONCLUSION	37
APPENDIX	
OPINION AND JUDGMENT OF THE DISTRICT COURT	A

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Page

Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 1225 (1972).....35

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Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).....19

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fifth Amendment.....2, passim

United States Constitution, Sixth Amendment.....2, passim

United States Constitution, Fourteenth Amendment...2, passim

28 U.S.C. § 1254.....2

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Weinstein's Evidence § 803(5)[01] (1984).....30

Federal Rules of Evidence § 803(5).....30

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No.

ROBERT ABRAMS, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Petitioner,

-against-

MICHAEL ROMAN,

Respondent.

TO: THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES

Respondent Michael Roman submits this brief in opposition to the petition of the State of New York for certiorari before judgment seeking direct review of the judgment of the United States District Court for the Southern District of New York rendered May 28, 1985. Respondent received a copy of the petition on July 23, 1985.

OPINION BELOW

The opinion of the United States District Court for the Southern District of New York is not yet reported. It was issued May 16, 1985, and the slip opinion is attached at the appendix hereto.

JURISDICTION

Respondent contests this Court's jurisdiction as not timely invoked under 28 U.S.C. § 1254 or Rule 18 of this Court's rules, because there has been no decision by the Court of Appeals and deviation from normal practice is not justified by "imperative public importance" or need for "immediate settlement". Respondent received a copy of the petition on July 23, 1985.

STATEMENT OF THE CASE

Respondent objected at his state trial, on his state appeals and in a petition for a writ of habeas corpus filed in the United States District Court for the Southern District of New York that the state prosecutor had challenged white jurors during voir dire proceedings on the basis of their race in violation of the Fifth, Sixth and Fourteenth Amendment rights to due process, equal protection, and the right to a jury chosen from a cross-section of the community. The writ has been granted on a finding of "deliberate" and "invidious" state deselection of jurors on the basis of race.

1. The Jury Selection

Respondent and his co-defendant are white, and the prosecution's chief witness and half the population of the Bronx are black.

The 1980 Census determined that the adult population of Bronx County was about one-third white non-hispanic, one-third black non-hispanic and one-third black and white hispanic. (Respondent Hearing Ex. 1). Thus, the total population of black people in the Bronx, including both the one-third black non-hispanic population

and the substantial portion of black hispanics, would total approximately 50%. Although no records are kept of the racial makeup of the jury pools in the Bronx, a study conducted by the Legal Aid Society in July, 1983, of some 20 criminal cases in the Bronx, determined that 46% of the pools were black, 37% white and 17% black and white hispanic. (Alperstein 28-31).[1] Estimates by a criminal law practitioner and a judge's law clerk who observed panels in the Bronx in the years 1980 and 1981, place the racial color of the jury pools at 40 to 75% black (Kirchheimer 17; Schwarz 27). The Assistant District Attorney who chose the jury for the state of New York in this case estimated that the percentage of black jurors in the pool for selection amounted to somewhere between 45 to 55 % (Levin 36),but a defense lawyer at the selection complained that there were very few whites in the pool (S 102).

The prosecutor was looking for jurors who were famliliar with and had had information about the problem of arson for profit in the Bronx (Levin 55). He worked closely on the case with Barry Kluger, the Assistant now head of the arson bureau, who took over the summation when Mr. Levin later became indisposed (69-70), and Mr. Kluger argued to the jury, "Ladies and gentlemen, you live in this county. I am sure the term arson for profit is not foreign to you" (T. 1434-1435).[2] There were tensions in the community concerning such arsons, and these tensions involved protests

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[1]Numerical references preceded by a name or the letter "H" are to pages of the transcripts of the hearing in The District Court. The state jury selection proceedings are preceded by an "S", and the state trial transcript references are preceded by a "T".

[2]Objection to this comment was sustained by the trial court.

by tenants against landlords who were perceived as responsible. These tensions were reflected in media coverage (Levin 72-78). Most landlords in the Bronx are white (78). Two-thirds of the population of the Bronx is black and hispanic (Respondent's Hearing Ex. 1). The prosecutor wanted jurors who would be sympathetic to his black chief witness, jurors who had come from the ghetto and who were most like the black witness and most unlike the white respondent, and who would thus convict (H 56-58, 124).

Throughout the trial of this case, the prosecution emphasized the co-defendant's ownership of the building and respondent's alleged interests therein as his "partner".[3] They gratuitously and falsely portrayed respondent as a rich man who owned a swimming pool (1200-01), "safe in [his] home in Long Island".[4] (T. 1437). The prosecutors argued that the defense witnesses, who testified to the standing joke about blowing up the building, were doing so "to help their employers . . . two business partners ..." (T. 1453). They referred to the "business dealings of Mr. Roman and Mr. Schreiber" (T. 1457), and, throughout, referred to "they" and "their", concerning such dealings and the profit that was to be made, i.e., "If they blew up the building and collected their insurance they still owned the land. They can still sell the land and they can collect twice." (T. 1470-71) (emphasis added). In the Appellate Division, the prosecution described respondent as Schreiber's "partner in the Hunts Point Taxi Exchange (Petitioner's Br. in the

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[3] In fact, there was no evidence of ownership interest by respondent; he was just a manager.

[4] Mr. Roman had no home on Long Island and no swimming pool. Objections to these remarks were made.

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Appellate Division at p. 4, incorporated as Exhibit 1 to Aff. in Opp. to Petition in the District Court)

The prosecutor's intention was to find jurors who would convict, and he believed that those most like his main witness, a black street person with a long criminal record, and most unlike respondent, a white business manager, were the ones who would convict. It was the prosecutor's belief that jurors would be sympathetic to his case and more likely to convict if they reacted emotionally rather than analytically to the principals, and that a favorable emotional reaction to his witness and an unfavorable one to Mr. Roman would be more likely in black jurors most like the former and most unlike the latter (Levin 56-58, 124).

On the first round, the prosecutor challenged six people, four of whom were white and two of whom were light skinned hispanics. These were all the white people in the box, leaving, after four defense challenges, two black people, Yvonne Bumpers and Carmen Velez (S. 51-54; Petitioner's Hearing Ex. 1; H. 94-95).

Defense counsel objected immediately to the exclusion of white people. On the basis of this one round, the state court judge did not require an explanation from the prosecutor. Defense counsel had argued that the racially discriminatory motivation was clear even in this round, but given the reticence of the court he argued further that the motivation would be "perspicuous", i.e. become clearer, in subsequent rounds as the pattern continued (S. 53). The prosecutor agrees that at least one of his two hispanic challenges on this first round was a light-skinned person (H. 94-95; S. 53). His notes indicate that the juror Rosario had stated that her children were assaulted by a "Black guy", and the prosecutor excused her

because she would not have been sympathetic to his black chief witness (H. 95).

In the second round of challenges, the prosecutor excused three jurors, at least two of whom were white. The one white person he did not challenge was illiterate and wanted to hear a defense case, i.e. a juror expressly favorable to the prosecution, who placed a burden on the defense and who would have reacted emotionally and would most likely have been challenged by the defense, as she was. The defense again objected, and this time the state court judge warned that the prosecutor could not challenge racially and that enough had been shown to require him to explain his peremptories. The prosecutor's only explanation was that the defense had been excluding blacks (S. 66-69), an explanation he reiterated after the third round of challenges (S. 77). At the time of these events, the leading appellate decision in New York State forbade prosecutorial challenging on racial bases and required explanations upon apparent discrimination. People v. Thompson, 79 A.D.2d 87 (2d Dept., Feb. 2, 1981).

By the end of this second round, six jurors had been picked. According to the defense they were all black. Even the prosecutor conceded at the time that "the majority" were black, and he testified at this hearing that the remainder could have included black hispanics whom he wouldn't call black (S. 68; H. 97). In fact only one of the remaining jurors had a Spanish surname, Carmen Velez. She was left over from the first round with another black, Yvonne Bumpers. None of the four blacks seated in the second round had a Spanish surname; they were Williamson, Hill, Davis and Roher (S. 70). Thus, by the end of the second round, the seated jury was all black and the

prosecutor had exercised nine of his fifteen challenges, eight of them against white people. He was also on notice that the state Court had found a prima facie pattern and wanted reasons, about which the prosecutor remained silent, except to counter-accuse the defense of racial exercise of challenge against black people.

In the third round, the prosecution exercised one challenge and the defense two. There is no information on the race of the former (S. 77). Nine jurors had now been chosen; three new ones were at issue.

One of the three, an Italian man named Baretti, had stated that he would have difficulty following unjust laws and that he had met the judge once ten years earlier (S. 84-88). The prosecutor succeeded in the fourth round, over defense objection, in removing this juror, another white person, on the spurious cause grounds of the meeting, which the judge himself called "very weak", and on the unjust laws ground which the defense has argued is unconstitutional (S. 84-88). The defense peremptorily challenged two people in the fourth round. Three jurors were still at issue.

In the fifth round the defense peremptorily challenged two people, one of whom, passed by the prosecutor, was a white person who had a brother who was a police officer in the bronx (S. 93-94). A defense cause challenge was also granted. Three seats were still at issue, and two of them were filled by white people prior to the sixth round of challenges. (S. 95; seat numbers eleven and twelve were filled prior to the sixth round, and in the sixth round the prosecutor challenged these two seats).

In the sixth round, the prosecutor challenged the two seats that had just been filled with whites (S. 95,

100). In reply to defense objection, the prosecutor argued that he had allowed two other whites to remain on the jury unchallenged. Thus, by the sixth round, four whites were seated in the box. The prosecutor's challenge in this round reduced them to two, leaving, according to defense attorney Raskin, "only a few whites left in the group" available for selection. (S. 102). The Court agreed with the defense that the two unchallenged whites were directly related to police officers, overruled the prosecutor's contention that no pattern had been shown, and ordered the prosecutor to give his reasons for his challenges (S. 102-103). The prosecutor immediately withdrew the challenge to one of the whites and stated that the other had a lifestyle different from that of his main witness. Thus three whites remained on the jury, and the prosecutor had exercised eleven peremptory challenges, nine against whites, and one spurious cause challenge against a white person. One juror remained to be picked. The seat, #12, was filled with a white person.

In the seventh round, the prosecutor challenged the white person in seat #12. The Court again stated that the prosecutor must explain his reasons for every white challenge (S. 137). The only explanation offered was that #12 was a computer operator (S. 138). At that point, ten of the prosecution's twelve peremptories had gone against whites, and no reasons had been given for eight of them.

In the eighth and subsequent rounds there were no challenges and the selection was completed, but the trial court referred findings on the racially discriminatory challenge practice of the prosecutor to the state appellate courts who, however, later refused to rule given a

subsequent contrary decision by the New York Court of Appeals. People v. McCray, 57 N.Y.2d 542 (1982).

Having at the time of the selection avoided the opportunity to explain his white challenges and having withdrawn one upon such a prospect, three years later and 50-60 trials (H. 80) the prosecutor attempted to deduce his motivation, not from memory, but by a process of reasoning based on attributes of the jurors which he had noted down during the selection process. Objections to such testimony by deduction and to the notes as hearsay not qualifying as past recollection recorded were overruled pending briefing (H. 37-40, 141).

Aside from the overall orientation toward black jurors and away from white jurors, as already described above, the prosecutor did not deduce reasons for four of his white challenges, Isabelle Martin #10 in the first round, (H. 44-45, 88-89; first page Petitioner Hearing Ex. 1), Nicholas Barmachia, #8 in the third round (H. 49; 3rd page Petitioner's Ex. 1); and Sonia Madison and Ethel Devane, numbers 11 and 12, in the sixth round (H. 53, 111-112; 4th page Petitioner Hearing Ex. 1). Indeed, Madison was the challenge he withdrew when the Court ordered him to state his reasons. He withdrew the challenge because "I got a little heat from the defense" (H. 112).

As to other challenges, the prosecutor looked at his notes, picked an attribute written there, and deduced that the attribute must have been responsible for the challenge even though attributes were written as received and were not written down as per se reasons for the challenge (H. 84-85). Information was written down as fast it came in, during questioning by the judge and the parties, and it was often illegible three years later in his notes

(H. 84). General information was recorded to give some idea of who the person was, but the salient reasons for a challenge were sometimes not recorded while irrelevant information was (H. 85). The prosecutor was, "trying to reconstruct how [he] was thinking" (H. 113) based on the "attributes, problems, and qualities" written down (H. 87), in order to give a general statement of how he challenged in the case (H. 134). The notes, the transcript and the fact of a challenge would lead him to conclude what he "would" do under the circumstances (H. 91-92), but "aside from what is on paper" there were individual reasons for the challenges which do not appear in the notes and which he did not recall (H. 53, 134, 36-37, 40, 45). He did not remember individual jurors (H 93). He conceded that attributes deduced for some challenges may not have been responsible for other challenges (H. 57), and that attributes, like "stepson", (Martin, #10, 1st round), or "UPS" (Davis, #8, 2d round) or "housekeeper" (Gordon, #12, 3rd round) or "Public Administration NYU" (Cogue, #7, 3rd round) or "NY Telephone" (Devane, #11, 4th page) had no bearing on the reason for challenges even though they were written in his notes. The prosecutor deduced, for example, that a white juror who had the word "electronics" written under his name (#5, 1st round, Richard Hahn) and a white juror who had the word "bookkeeper" written under her name (#9, 1st round, Camille Vascoggia) and another white juror who had the words "computer operator" under his name (#12 7th round, Peter Cross) were challenged because such people are too "scientific" (H. 43, 45, 53). However, a black computer operator, Yvonne Bumpers (#2 in the first round) was not challenged by the prosecutor (H. 121-122), nor was juror #7,

Velasquez, who worked for RCA (first round, Petitioner Hearing Ex. 1; H. 117, 122).[5]

Another fact appearing among others under the names of many of the white jurors was that they or their relatives were victims of crimes, so this was deduced to be a reason for their challenges, yet the black juror, Bertha Hammons, #1 in the first round, whose brother and sister were killed in separate assaults, was not challenged by the prosecutor (H. 123). Nor was Carmen Velez, one of the black jurors left after the first round, even though her children had been abducted (H. 124). Other black victims of crime, like Willie Hill (#10, 2d round), and Elice Rollie (#12, 2d round) were not challenged by the prosecutor.[6]

A third factor that appeared among others beneath names was relationship to police officers, and it was then chosen as a reason for challenges on the purported rationale that people close to law enforcement would least understand the necessity for their relatives to use unsavory witnesses and would therefore tend to believe that their relatives would tender perjured testimony. Aside from the facial pretext in this rationale, black relatives of police officers, like Velasquez (#7, first round) and Doreen Williams[7] (#3, second round) were not challenged (H. 117-118). The pretextural nature of this rationale is

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[5]Bumpers and Velasquez were black. All of the prosecutor's challenges in the first round were directed at whites, leaving only black jurors. Bumpers was one of the two black jurors left after the first round. Velasquez was passed by the prosecutor, but challenged by the defense.

[6]See the discussion of the second round, supra, where an analysis of the transcript shows that these jurors were black.

[7]One of the black jurors remaining after the second round. See discussion, supra.

further exemplified by the finding of the state trial court that two of the white jurors left unchallenged by the prosecutor were relatives of police officers.

> MR. RASKIN: Those two whites that he did not challenge were, I believe two in number. Aside from those that have been sworn and those two were directly related to police officers, Your Honor.
>
> THE COURT: I think that is my recollection.
>
> (H. 102).

The prosecutor has said nothing to correct this conclusion (See also pages 93 and 94 of the selection proceedings), and, indeed, concedes that he failed to challenge these whites on that ground (H. 111).

2. Summary of the Evidence

On July 3, 1980, one Earnest Brooks was arrested and charged with burglary. Because of his extensive criminal record, Brooks faced substantial penalties. He therefore suggested to the arresting officers that in return for leniency he would give them information about a pending conspiracy, of which he was a part, to blow up a building in the South Bronx area. According to Brooks, the explosion was to take place the next day, July 4th. The officers accepted the offer.

The following day Brooks went to the Hunts Point Taxi Exhchange, located at 1201 Oak Point Avenue, in the Bronx, carrying a portable radio/recorder and had a conversation with respondent Michael Roman, an employee at the Exchange. Brooks recorded the conversation. During the next month Brooks, wearing recording devices supplied by offices of the Bronx District Attorney's squad, returned to the Exchange and had three other conversations with Michael Roman, each of which were recorded. In August, 1980, Roman

and the owner of the subject building, Harold Schreiber, were arrested and charged with conspiracy in the first and second degrees. Both were ultimately convicted after a jury trial of conspiracy in the fourth degree.[8]

The objective evidence in the case did not establish respondent's intent to conspire with Harold Schreiber to blow up the building. The co-defendant Schreiber's intentions, allegedly evidenced by his unilateral, short-term increase of the insurance coverage on his buildings which he bought, owned and managed, are not at issue in this case. Respondent was an employee, albeit with managerial responsibilities.[9] Like the four other employees who testified for the defense, he also talked, joked, or fantasized about blowing up this building where they all sweated over taxi repairs every day. The only evidence in the case against him consisted of conversations like those had by the other employees whom Brooks did not happen to tape. Whether or not Schreiber's intentions were real and acted upon, respondent had no authority and no participation in Schreiber's insurance machinations, city tax negotiations or real estate dealings. He did no more than engage in facetious talk as did the four unindicted employees who testified for the defense.

Even in that area of the case, the evidence was at best equivocal that Schreiber would have made more money destroying the building than selling it. The building was

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[8]Schreiber appealed his conviction which was affirmed without opinion on June 9, 1983. People v. Schreiber, 95 A.D.2d 673.

[9]Although there was evidence that respondent was a nominal vice president of the Exchange, there was no evidence that he had a proprietary interest in it or the buildings (1191-1244).

worth a million or a million and a half and could easily have been sold (1075-90).[10] Schreiber had paid $200,000 for it in 1978 (961-63). At the time of the supposed plot to destroy the building there was a total of $720,000 in insurance protection (867-74). Out of those proceeds two mortgages totaling $315,000 would be paid, as well as $51,412 in back taxes (980-83). The building was under-insured and would consequently suffer a penalty for partial loss. It would have to be at least 50% destroyed before any pay out was made, and none would be made if arson was suspected. Thus, a claim under the insurance policies might have resulted in a pay-out less than the amount of the mortgages (863-902), and certainly would have resulted in less profit than a sale.

Objective evidence of preparation of the building for arson was also lacking. The vents on the roof had to be sealed to trap gas inside. It was doubtful that a gas explosion would entirely destroy the building (927-43). There were some sixty such vents (1177-91; 1313-26), but only five had been sealed as of the inspection by the police on August 14, 1980, ten days after the defendants' arrests (135-159), and these could have been sealed by Brooks on July 17, when he went to the roof on his own after he was cooperating with the police (418-50, 453). Brooks himself testified that he was supposed to have blown-up the building on the previous July 4th (296-97), and an employee of the Exchange is heard on a body tape made by Brooks on July 15, telling Brooks he had been ordered to stay away from the building (501-04; 516-24). Indeed, Roman himself is heard

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[10] Numbers in parentheses refer to pages of the trial transcript.

on a body tape made by Brooks on July 17, telling Brooks to stay away from the building. The building had a functioning sprinkler system (1313-17), and the gas pipes going into the Taxi Exchange section were either not functioning (209-12), or had been turned off as of May, 1980 (814-17; 820-21).

Thus, the case against respondent depended entirely on Brooks' testimony and on the tapes Brooks made while wearing a body recorder. As is argued in respondent's cross-petition, Brooks selectively recorded conversations and these were in turn only selectively played to the jury, omitting conversations showing respondent's lack of knowledge and intent, i.e. the first tape of July 4 wherein respondent expresses ignorance of any plot on the day the building was to be blown-up, and the tapes of July 17 and 18 where respondent orders Brooks to stay away from the buildings and refers to roof repairs as the only reason for Brooks' legitimate presence there.[11] Transcripts of all the tapes were introduced as exhibits at the habeas corpus hearing. The District Court declined to receive the tapes themselves.

Brooks himself was a wholly unreliable witness. The prosecutor called him "a liar" (38). The investigating detective similarly characterized him. (241-42). He had thrice been previously jailed and his arrest record included

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[11]Defense counsel announced in open court outside the jury's presence that the July 4 tape was exculpatory, but neglected to introduce it into evidence (666-675). He did not seek to introduce the most significant exculpatory portions of the July 17 tape, and the trial count denied admission of the other portions (418-450). The July 18 tape was admitted in evidence, but the significant portions were not played (1263, 1548). In the state appeals and in the District Court, the omission of this evidence was argued as resultant in an unfair conviction and ineffective assistance of counsel.

weapons, burglaries, thefts and attempted robbery (284; 362-69). The prosecutor stipulated that Brooks had lied under oath at a material witness hearing held by the prosecutor because Brooks had stated on a tape made by defendants that he would abscond and refuse to honor his deal (1-39; 269; 639-56). At the hearing Brooks denied that it was his voice on the tape, and the prosecutor testified at the hearing that it was his voice (1-39; 269; 639-56). At trial Brooks admitted and denied that he had lied about his participation in the conversation (490-500). Then he admitted telephoning respondent many times after his incarceration as a material witness, seeking respondent's help to bail him out (403-409).

Brooks originally made his deal to testify after an arrest for burglary when a police officer told him he had a lot of outstanding warrants against him and had better do something to help himself. A witness to this conversation testified that Brooks began immediately "to drop a dime" on everybody (1012-17). Knowing full well that employees around the Exchange idly talked of blowing up the building, he could well have decided to make a case that would completely resolve his own outstanding cases. He need only tape people talking at the Exchange as they always did. Indeed, his tactic was revealed on the July 4 tape, which was not played to the jury. Brooks testified that he concealed the recorder inside a radio (760-764). On the tape, Brooks is heard attempting to prompt respondent by questioning about the diesel fuel that was supposed to be used that day to blow-up the building. As soon as respondent expresses ignorance, the radio, which housed the recorder, is turned on masking further conversation. Brooks himself finally admitted that he was never going to be paid

and he never intended to go through with the arson (381-83). He admitted to respondent, his brother, and to the co-defendant's attorney that both he and respondent regarded the arson talk as a joke (371-77, 1014).

On the witness stand Brooks told the following lies:

1. He was not told to stay away from the Exchange. On the July 15 tape, his own brother Morris is heard telling him that he had been ordered to stay away (490-500). Moreover, on the July 17 tape, not admitted in evidence, respondent himself tells Brooks that he (Brooks) is "poison" and must stay away from the premises.

2. He did not threaten to throw Schreiber off the roof, even though his threat is on a tape (526-46).

3. He did not hammer on the roof on July 17, when it was contended by the defense, he was fabricating sealed vents. Confronted with the fact that hammering can be heard on the tape, Brooks admitted hammering (418-450) [12].

4. Schreiber told him to go to the roof on July 17, but the tape of July 17 reveals that he had no contact with Schreiber on that date (454-55). [13]

5. He never used cocaine, but three witnesses saw him using it (1012-17; 1138-50; 1245-54).

6. He did not speak to the prosecutor much about this case, but the prosecutor revealed otherwise (679).

7. He did not tell the Pre-trial Services Agency that he worked for Yates Roofing Company at $176 a week, but the agency's report states otherwise (290; 595-596).

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[12] The Court denied a defense motion to play the July 17 tape (418-50).

[13] See Footnote above.

8. The gun with which he was arrested in August, 1980, had been used in three homicides, but he gave a different explanation of its history when he pled guilty (709).

9. When he was arrested he lied to the arresting officer that his name was Robert Gladden (490-500).

10. He denied the fact as stipulated that he had told Schreiber's attorney that the so-called plan was a joke (382; 1074).

11. He was hired to blow up the building because he was an expert (558-59) but he knew nothing about how to blow up a building. (393)

In sum, as the prosecutor argued to the jury, "it is not through the words of Preacher Brooks that I ask you and will ask you to convict Michael Roman and Harold Schreiber, but it through the words of Michael Roman himself". (1443, 1448). As is established in the cross-petition, the jury did not hear all the words of Michael Roman, only those which superficially supported the prosecutor's argument.

REASONS FOR DENYING THE WRIT

THE DISTRICT COURT'S FINDING OF FACT THAT "THE PROSECUTOR USED HIS PEREMPTORY CHALLENGES DELIBERATELY TO EFFECT THE INVIDIOUS PURPOSE OF ELIMINATING OR REDUCING THE NUMBER OR PROPORTION OF WHITE JURORS" RENDERS THE CONVICTION INCONSISTENT WITH THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS AND DOES NOT REQUIRE CONSIDERATION BY THIS COURT PRIOR TO REVIEW BY THE COURT OF APPEALS.

The Court has granted certiorari before judgment only in rare cases, and only when "the public importance of the issues presented and the need for their prompt resolution" demanded. United States v. Nixon, 418 U.S. 683, 687 (1974) (subpoena to President to produce Watergate tapes). See also Dames & Moore v. Regan, 453 U.S. 654

(1981) (Executive order concerning Iranian hostage crisis); United States v. Thomas, 361 U.S. 950 (1960) (per curiam) (voting rights decision jeopardized Louisiana's imminent general election); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Executive Order seizing steel mills during Korean War); United States v. United Mine Workers, 330 U.S. 258 (1947) (national coal miner's strike). The decision of the United States District Court in this case that respondent's trial jury was unconstitutionally selected on the basis of race hardly compares. The Court of Appeals for the Second Circuit is surely competent to apply to this case the Constitutional law as already stated by this Court, in Swain v. Alabama, 380 U.S. 202, 204-205, 85 S.Ct. 824 (1965) and by the Second Circuit in McCray v. Abrams, 750 F2d 1113 (2d Cir., 1984) that purposeful and deliberate exclusion of jurors on the basis of race is offensive to the Constitution. There has been a District Court finding of fact that such deliberate exclusion was practiced by the State of New York in this case, and this Court does not sit to review such findings of fact based on credibility of witnesses. Anderson v. Bessemer City, ___ U.S. ___, 53 U.S.L.W. 4314, 84 L.Ed.2d 518 (March 1985); Pullman Standard v. Swint, 456 U.S. 273 (1982).

In this case respondent has also raised two cross-appeal issues which should be first decided by the Court of Appeals: the unconstitutionality of a sustained challenge for cause to a juror who merely expressed a general reservation about obedience to unjust laws and the withholding from the jury of the exculpatory parts of a series of tape recordings which established respondent's innocence of conspiring to commit an arson which never took place.

Respondent has been at large on bail since his state conviction in 1981. He has had no difficulty with the law, lives with his wife and son, and works at those jobs which can tolerate the frequent potential interruptions for surrender occasioned during the appellate and habeas corpus proceedings in the periods since conviction. Thus, there is no emergency need to bypass the Court of Appeals in his case, and there are no ramifications beyond those already occasioned by the pendency of decision in Batson v. Kentucky, No. 84-6263, itself.

This case is different from Batson and McCray, because a United States District Court after a hearing found as a fact, "Based on the entire record before me I am convinced and find that the prosecutor used his peremptory challenges deliberately, insofar as possible, to effect the invidious purpose of eliminating or reducing the numbers or proportion of white jurors who would try Roman's case." Roman v. Abrams, 85 Civ. 763, SDNY, May 15, 1985, (slip. op. at p.15) (App. A, infra)

> ....we note agreement with the condemnation by the Court in McCray of a prosecutor who exercises challenges based solely on his or her own personal bigotry or some perceived stereotype concerning a cognizable group, as opposed to case-related reasoning. The fact that such persons were excused due to glaring and unfounded generalizations based on factors such as race is certainly pernicious without regard to the facts of the case....
> (slip. op. at 29)

> More than once, at the trial and in the federal habeas corpus hearing, Roman's prosecutor in effect conceded that at least some of his challenges were racially motivated. Verbalizing those challenges as intended to obtain jurors with whom the credibility of the prosecution's black accomplice witness would be enhanced, as he did (Habeas Tr. 55-57), describes the doughnut without mentioning the hole that goes with the doughnut; such discriminatory selections diminish the rights of the defendant to a representative jury at the final stage

of the selection process, as granted in McCray.

(slip. op. at 15)

> To the extent the prosecutor did respond at all to the trial judge, his comments were most revealing. In Round 6, as to one challenge, the admission was made by the prosecutor that he believed that the white juror could not be fair to my witnesses. (Voir Dire Tr. at p. 103). No reason for this belief was given, nor does one appear from the record. The principal witness for the prosecution was a black person who was characterized later at the federal habeas hearing by the prosecutor (Tr. at 56), as "not very bright," who had an "extensive [criminal] record," "plainly he was a commercial burglar" with "20 or 30" burglary arrests, and "violent enough not to have people even listen to who he is" (id. at 57). This is a plain admission by the prosecutor of an invidious, racially motivated exercise of at least one peremptory in Round 6. As to the other such peremptory exercise in that Round, rather than verbalize a reason, the prosecutor withdrew his challenge of a white juror, in the tradition of the child whose fingers had been caught in the cookie jar.
>
> (slip. op. at 12)

These findings, now having been made, may not be overlooked or avoided on the grounds that such inquiry in general is too costly, or that a hearing should never have been held.[14] The very fact that "pernicious" and

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[14] Respondent herein adopts and incorporates as additional reasons for denying the writ and as argument on the merits of respondent's own case in the event of summary disposition, those reasons, laws and arguments set forth by the petitioner James Kirkland Batson and amicus curiae on his behalf in Batson v. Kentucky, No. 84-6263 and respondent Michael McCray in McCray v. Abrams, No. 84-1426, certiorari petition filed March 4, 1985, 53 U.S.L.W., to the extent applicable to respondent herein on the necessity for the hearing in the first place. The facts that respondent Roman and the deselcted jurors in his case are white should not distinguish this case from application of the general constitutional principles against racial discrimination. Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163 (1972). For this reason the preliminary decision of Judge Goettel in Schreiber v. Salamack, 85 Civ. 1263 is erroneous. Also, it was not rendered on the hearing record held before Judge

(Footnote Continued)

"invidious" discriminatory activity by a state prosecutor was uncovered is justification for the procedure that uncovered it. Thus, the District Court's concern that, "the transactional costs involved in litigating whether the reasons are 'pretextual' will be vast and the reliability of the results uncertain." (slip. op. at 20), is belied by its own findings. In fact, as the Court itself found, the additional federal habeas corpus hearing in the case was necessitated by the prosecutor himself. Despite a decision by the highest appellate court of the state to rule on the question at the time (People v. Thompson, 79 A.D.2d 87 (2d Dept., 1981)), requiring the prosecutor to state his reasons for challenges to one race, and despite the state trial judge's demand that the reasons be given in this case, the prosecutor refused to do so. As the District Court found, "The prosecutor had the opportunity to give reasons for the challenges at the time of trial. Having foregone that opportunity, the inference that his challenges were racially motivated is quite strong especially where, as here, out of eleven challenged jurors, ten are white." (slip. op. at 15).

Had reasons been supplied to the state trial judge, as demanded, the selection proceedings would either have been aborted and begun anew with no substantial loss of time or effort, or the proceedings would have continued with no loss of time at all, and only the record need have been reviewed if federal habeas corpus was sought. As it was, even the federal habeas corpus hearing that was held in this

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(Footnote Continued)
Brieant in this case. Furthermore, now and when respondent Roman's jury was selected in Bronx County, New York in 1981, whites constituted a minority, specifically a one third plurality, of the population and of the jury venires. See the decision of the District Court, slip opinion page 23 and n. 10 (Appendix, infra) and see infra, this brief.

case consumed only approximately four hours over two days, and the judicial and counsel resources expended in reaching a decision were necessitated because an actual violation of Constitutional rights was being uncovered and the fact of such a violation could not be foreclosed at any earlier stage in the proceedings.

Furthermore, the actual application of the fundamental constitutional principles of the presumption of innocence and the burden of proof beyond a reasonable doubt are at stake in this issue. Jurors of the same race as the defendant are not more favorable and therefore justifiably excluded on an arguable peremptory ground of tendency to partiality. On the contrary, same race jurors tend to be the most impartial because they are more inclined to apply the presumption of innocence and to accord the benefit of the doubt that the law demands. Their judgments tend, more so than opposite race jurors, not to be encumbered by all the excess baggage of racial stereotypes carried into the courtroom by jurors of the opposite race. Prosecutors should not be permitted to remove these most impartial of jurors from the jury pool.

Prosecutors know, as we all do, that stereotypes are more likely the more different are the judges from the judged. The New York Times of May 16, 1985 (p.B4), reported that it's joint poll with WCBS-TV showed that whites tended to be more fearful of black teenagers than blacks, meaning that whites more often assumed potential criminal behavior by black teenagers on the ground of racial appearance alone. In a courtroom, that translates into a presumption of guilt which supports conviction. Social psychologists have scientifically demonstrated that members of out-groups appear more homogenious, that inferences about such groups

are therefore made more quickly and on less information, that superficial judgments are more readily made of those of another race, that memory accuracy is worse cross-race, that in-group members are liked better than out-group members and that stereotypes tend to persevere in the face of contradictory evidence. For example, a black child who takes an eraser from another may be percieved as aggresive, whereas a white child would be seen as assertive by a white observer (see Fiske and Taylor, Social Cognition, 1984, Addison and Wesley Pub. Co.).

Prosecutorial selection of opposite race jurors skews the system, at least for the specific trial at hand, toward one which tends not to give defendants the benefit of the reasonable doubt. As long as our Constitution requires a system that accords that doubt, prosecutorial exercise of racially motivated challenges cannot be justified as an arguable, if imprecise, way for prosecutors to guage fairness to their own cases. Fairness to their own cases is not different from fairness to the defendants, at least as the Constitution defines it.

Now joining the Second Circuit, the United States Court of Appeals for the Fifth Circuit, albeit under its supervisory powers, holds that prosecutional exercise of jury challenges on the basis of race will require reversal of the conviction and that inquiry must be made of the prosecutor where it appears that racial selectivity is taking place. United States v. Leslie, ____ F.2d ____, 37 Cr.L 2122, No.83-3719, decided April 10,1985.

The District Court's findings of fact and conclusions of law according to McCray v. Abrams, 750 F.2d 1113 (2d Cir., 1984) and its rationale are supported by the record.

Ten of twelve of the prosecutor's challenges were directed against white people, "there being only a few whites left in the group" to be selected (Raskin S. 102). Six of those ten white challenges were exercised on the first round before an objection could be made, and two more were accomplished before the Court ordered an explanation for these white challenges. No explanation was given other than that the defense was challenging black people, and it was only after objection that the prosecutor allowed some white relatives of police officers to remain in the box. When reasons were demanded, only two of the ten white challenges were explained, and one such challenge was immediately withdrawn because of "heat from the defense" (H. 112). Three years later, the prosecutor concedes that he sought jurors most like his black chief witness and most unlike his white businessman defendants, because such jurors would be most likely to react emotionally and convict in an atmosphere of black tenant, white property owner disputes over arson for profit in the Bronx. Throughout the trial and in summation, the jurors, whom the prosecutor selected on the basis of their familiarity with these disputes, were reminded by him of the property ownership characteristics of the business partners with swimming pools on Long Island, and they were exhorted to use their familiarity with arson for profit in the Bronx to convict.

Against this overwhelmingly apparent racially directed selection procedure, the petitioner offered self-serving testimony that the prosecutor was not "challenging whites indiscriminately" (H. 112), and various hypothetically possible deduced attributes from largely illegible notes. Petitioner contended that these attributes may have been responsible for the challenges, but ultimately

they could not have been because, by the prosecutor's own admission, "aside from what is down on the paper, during voir dire, and I have an extensive voir dire, . . . I feel I have a very good idea of the type of person I wanted . . . a convicting type." (H. 53).

The state trial judge, over the prosecutor's objection that an insufficient showing had been made (S 68-69), found that the prosecutor's challenges directed almost exclusively at white people, required explanation. This was a state court finding of apparent bias, i.e., that the first prong of the McCray rule was satisfied and that the burden of proof had shifted to the prosecution to rebut the presumption. Although the trial Court deferred to the state appellate courts the ultimate question of the sufficiency of the prosecutor's responses, or lack of responses, the state court's initial finding of apparent bias is presumed correct under 28 U.S.C. § 2254(d), notwithstanding the absence of a written opinion. Wainwright v. Witt, ___ U.S. ___, 36 Cr.L. 3116, 3120-21 (S.Ct., NO. 83-1427, decided January 21, 1985). The highest appellate authority in New York at the time required the state judge to demand reasons under the circumstances. People v. Thompson, 79 A.D.2d 87 (2d Dept., Feb. 2, 1981).

An independent review of the record also supports the state court's prima facie conclusion. "McCray had established his prima facie case at the time of his first objection to the prosecutor's actions" (McCray v. Abrams, supra, at 1133) when the only facts were that the prosecutor had used eight of her eleven peremptories against blacks and hispanics. At the time of respondent's first objection in this case, all six of the prosecutor's challenges had been exercised against white people, and by the second objection

in the second round, eight of nine had been so exercised and the state judge wanted to hear reasons.

Thus based on the presumption of the correctness of the state court finding that a prosecutorial explanation was necessary, and on all the supporting facts adduced at the two hearings on this question, it is submitted that the petitioner had the burden, initially in the state court, to prove satisfactory, genuine, non-pretextural, Fifth, Sixth and Fourteenth Amendment cognizable reasons for its agent's nearly exclusive challenges of one race. Not only was that burden not met, but, as the District Court found, the prosecutor's testimony and the entire record established independently the racially oriented exercise of the prosecutor's peremptory challenges. In the state court, reasons were offered for only two of the ten white challenges, notwithstanding the opportunity on court order to give them all, and a third challenge was immediately withdrawn when reasons were demanded by the trial court. Indeed, the counter-accusation that defense counsel were also challenging racially was in effect an admission that this was the prosecutor's practice in this case.

The intentional avoidance and "default" of the prosecutor in the state court at the time most relevant to the prosecutor's state of mind, could have been dispositive in the District Court, obviating the need for further expenditure of judicial resources. The Second Circuit ordered a hearing to be conducted by the District Court in McCray, only because the state court had not conducted one; the prosecutor there had not been afforded an opportunity to give reasons, even though she had asked for it; and the state trial court had held that the law did not require it. McCray, supra at 1133-1135. In this case, the trial court

correctly held that the law required the prosecutor to give reasons, ordered him to give them, and reasons were avoided for three years until the petitioner was faced with the granting of a federal writ, notwithstanding that the leading appellate decision in New York State at the time the jury was picked in this case had held that apparent racial criterion in selection required an explanation from the prosecutor. People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (2d Dept., decided Feb. 2, 1981).

Whereas in McCray, under the circumstances, state-federal comity mandated the hearing, no such considerations applied here, where the hearing only served to give the state a second chance, not a first chance, to attempt to explain itself. The result was to thrust onto the federal judiciary the time consuming task of adjudicating an embarrassingly transparent attempt years later to supply possible non-racial motives, when that was avoided in the first instance before a state judge who witnessed the voir dire, understood local conditions in the Bronx, and who had expressed concern about the prosecutor's practice. See People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Reptr. 890 (1978); Commonwealth v. Soares, 377 Mass. 561, 387 N.E. 499 (1978) cert. den. 444 U.S. 881 (1979).

The problem in permitting a hearing where one had already been had, was well illustrated in the failure of petitioner to meet his burden even on the second go-round in the District Court. The prosecutor could not remember the individual jurors (H. 93); he had no independent

recollection of the reasons for his challenges;[15] "it is only from [his notes] that [he] could actually tell you the reasons why [he] challenged certain parties" (H 39-40). But, his notes were not "past recollection recorded". They did not record his reasons for challenges, rather they listed general and often irrelevant attributes that he noted, as information about a particular juror came out during the voir dire by the judge and counsel.

Much of what was written ultimately had nothing to do with the reasons for challenging. (H. 84-93, 111, 113, 134). For example, several attributes were written down under the name Isabel Martin, but were irrelevant to the reasons for the challenge (H. 44-45); the word "bookkeeper" was the only legible word under the name Camille Vascoggia, so it was chosen as the possible reason for her challenge, rendering irrelevant the other words written down (H. 45-46); Tina Martinez was challenged "probably for the same reason that she is a victim of a crime" (H. 47), so the fact that her status as a crime victim was written under her name was not dispositive of the reasons for challenge; for

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[15] When confronted with any question, he relied on the record of the proceedings (H. 101-102). He could remember almost nothing about the selection proceedings except, when it served his case, what he probably might have done based on his notes (H. 53, 91-92, 111, 113, 134). He had no memory of the individual jurors (H. 93). He couldn't even read much of his notes after 3 years (H. 84). Under these circumstances, the District Court's conclusion that the record should control over the prosecutor's lack of memory after three years was well-founded (H. 124). That record also refuted the prosecutor's gratuitously distorted memory that defense tapes were not turned over to him. The trial record at pages 1-40, 269, 639-656, 1074, shows that tapes made by the defense were in fact revealed to the prosecutor, that he willingly stipulated to their contents, and that as a result of those tapes he obtained a material witness warrant against his own chief witness who on the tapes was heard to try to make a deal to flee if respondent would bail him out.

Nicholas Barmachia, only the list of attributes under the name was recited and no attempt was even made at this hearing to relate these attributes to the reasons for the challenge (H. 49), and the words under Ethel Devane's name did not relate to the reasons for her challenge. (H. 53).

Thus, the notes did not accurately reflect the requisite knowledge at issue, the reasons for the challenges, and, therefore they did not qualify as past recollection recorded under F.R.Evid. § 803(5). The District Court's oral findings at the hearing that "that knowledge . . . recorded is not used solely for the purpose of exercising challenges" (H. 85), and that the prosecutor was "drawing an inference from the exhibit and the transcript as to why [he] probably did it" (H. 92), rightly characterized the notes and rendered them inadmissible to meet petitioner's burden of proof. Lack of recall, lack of legibility and lack of relevance of much of the list under the names, rendered any testimony that a single word under a name was now the reason for a challenge at best, self-contradictory and at worst, trumped-up.

A list of attributes, which may or may not have resulted in challenges, was not the same as a memorandum stating reasons for challenges. It is only the latter that is admissible as recorded recollection of such reasons. "To guarantee that the memory was properly transcribed, [Rule 803(5)] requires that the memorandum 'reflect that knowledge correctly'". 4 Weintstein's Evidence § 803(5)[01](1984). If this rule is not strictly adhered to, i.e. if petitioner's method of proof was accepted, interpretation, guessing and reconstruction about the meaning of the notes would have been substituted for proof, and the adversary would have been denied cross-examination and confrontation

because no one else could be qualified to refute a reconstruction. That was what occurred in this case and respondent's objection to the admission of the notes (H. 37-40, 141) was ultimately sustained by the treatment given the testimony in the District Court's final opinion.

In the end, of course, even the interpretative reconstruction had to fail. In the first place, no deduced reasons were even offered for four of the challenges, Isabelle Martin (#10 in the first round, page one Resp. Ex. 1) (H. 88-89); Sonia Madison (#11, in the sixth round, page four Resp. Ex. 1) (H. 53); Ethel Devane (#12, 6th round, page 4 Resp. Ex. 1) (H. 111-112); and Nicholas Barmachia (#8, third round, page three Resp. Ex. 1) (H 49). Where even one juror is improperly excused over defense objection, i.e., in this case where no valid reason was given the jury was unconstitutionally chosen. Davis v. Georgia, 429 U.S. 122,123, 97 S.Ct. 399, 400 (1976); Wainwright, v. Witt, supra.

Second, "In assessing the genuineness of the prosecutor's response and ... being alert to reasons that are pretextual", the Second Circuit in McCray referred to the situation where "reasons proferred by [the] prosecutor for peremptorily excusing blacks were equally applicable to whites not excused." McCray at 1132. In other words, where, as in this case, the reasons offered would apply to both white and black people, yet only whites were actually challenged for these reasons, then something other than these reasons, i.e. race, was actually operative. As detailed above in the Statement of the case, except for the reversal in races, lack of mutuality in proffered reasons across the races appears in this case. Black relatives of police officers, victims of crimes and data operators were

not challenged. In addition, the reasons themselves were refuted by the behavior of the prosecutor when, for example, he failed to challenge two token white relatives of police officers, notwithstanding his purported desire to rid the jury of such relatives. Furthermore, this purported reason, i.e. that relatives of law officers would tend to believe more than others that law officers would tender perjurious testimony from the witness Brooks is facially spurious.

Indeed, the prosecutor as much as conceded that race was ultimately the operative factor in his choices. He wanted street people from the ghetto, with the same lifestyle, who would be sympathetic toward his black, street person chief witness and who would be most unlike the white, businessman defendant Michael Roman. Race was thus a significant factor in the choice. He didn't want jurors who would analyze the evidence; he wanted jurors who were sensitive to tenant-property owner tensions between whites and blacks over the problem of arson for profit in the Bronx, who would react emotionally and convict. (H. 55-58, 72-28, 124). This criterion of conviction proneness leads inexorably to the choice of jurors based on sympathies and antipathies, and, therefore to race, rather than fairness and impartiality. It is just the sort of criterion condemned in McCray. Prosecutors may not choose jurors on the basis of predilection toward conviction.

> Any notion that [black] persons can be objective in viewing a case on its merits and that [whites] qua [whites] cannot, is particularly objectionable. In a case where a [white] defendant has been charged with a crime that has aroused racial passions, one may believe that [blacks] qua [blacks] are more likely than [whites] qua [whites] to convict; this, however, does not bespeak a greater objectivity so much as it does a greater propensity to convict. Obviously, the responsibility of the state and its prosecutor is not to

> secure a conviction at all costs; it is to see that justice is done . . . (1131)
> (emphasis added)

Petitioner sought to avoid all of the above with the claim that skin color is not a Sixth Amendment cognizable criterion, that exclusion of all peoples of the same color does not offend Sixth Amendment cross-sectional goals as long as some of the whites are of different ethnic cultures, or conversely that a selection procedure that seats all blacks would be okay as long as the blacks come from different countries or have different ethnic surnames. This assertion is completely at odds with historical, social scientific and legal authority on cognizable classes subject to racial prejudice and deserving of Constitutional protection.

In McCray itself, the Court specified skin color to be the criterion at issue.

> the notions that all persons who share an attribute, such as the same skin color, will, ipso facto view matters in the same way . . . [is] both fallacious and pernicious (1131)

In Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 689 n.5, this Court specified that the Fourteenth Amendment "declar[es] that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." (emphasis added). Again, in Cassell v. Texas, 339 U.S. 282, 70 S.Ct. 629, 631 (1950), the Court held that, "there can be no exclusion of Negroes as a race and no discrimination because of color ..." (emphasis added).

Historically in this country, segregation has been practiced first and foremost on the basis of skin color. This Court can judicially notice that blacks have not been excepted from those practices by presenting credentials of ethnicity from other countries. A black person caught in a white swimming pool in the South a few years ago would probably not have had the opportunity to present such credentials. "Negroes have been defined traditionally as all persons with any black African ancestry who cannot 'pass' as whites." Pierre L. Vanden Berghe, Race and Racism: A Comparative Perspective, Wiley and Sons, New York, 1967 at p. 79. And, Abraham Lincoln himself, certainly an authoritative historical source on the meaning of black and white relations in this country, declared during the Lincoln-Douglas debates in 1858, "I will say in addition to this that there is a physical difference between the white and black races which I believe will ever forbid the two races living together on terms of social and political equality." quoted at Vanden Berghe, supra.

Other arguments of petetioner were that he accepted some whites and challenged some blacks, and that the jury ultimately had three whites on it. He overstates his case. The record establishes that only two of his twelve challenges were against blacks and that these and his abstinances from white challenges came after the defense objected to his overall practice. In McCray, as well, the prosecutor had challenged some of the other race, and had accepted a token of the other race without exhausting her challenges. The issue is not the ultimate compositicn of the jury, although here it was disproportionately skewed against the race of respondent. The question is whether "the selection procedures themselves were not racially

neutral." Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 1225 (1972). Where the "opportunity" for racial selection is established, as it is here by the prosecutor's own admissions to the kind of dissimilar juror he was picking, and where even one juror was so chosen (Wainwirght v. Witt, supra; Davis v. Georgia, supra), and where there is a pattern of racially unitary challenging, "affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion." Alexander v. Louisiana, supra, 92 S.Ct. at 1226; McCray v. Abrams, supra at 1133.

Finally, without evidence that a juror's reservations about obeying unjust laws "would prevent or substantially impair the performance of his duties" (Wainwright v. Witt, supra, at 3122) the state court excused him for cause at request of the prosecutor, over defense objection (S. 84-86). Without such evidence of impairment, the record does not support the state Court's ruling, because the ruling was founded only on the juror's general views against unjust laws. A general opinion is not a foundation for exclusion, unless the opinion would "substantially impair" service. Wainwright v. Witt, supra. Nothing on the face of this opinion supports substantial impairment, and the presumption of correctness of 28 U.S.C. § 2254(d) is overcome, according to the exception for unsupported findings under subparagraph 8.

The record does not contain a representation that any particular law relevant to this case was viewed as unjust by the juror, or that the juror could not be fair, and it cannot be gainsaid that the generally accepted Judeo-Christian ethic would support a moral-religious conviction against obedience to laws like, for example,

those condemned by the Nuremburg Tribunals. Thus, the exclusion of this juror resulted in an improper selectivity: " . . . a jury composed exclusively of such people [willing to follow unjust laws] cannot speak for the community. Culled of all who harbor doubts about the wisdom of [such laws] . . . such a jury can speak only for a distinct and dwindling minority." Witherspoon v. Illinois, 391 U.S. 519, 520 (1968) (Reversing a conviction where those opposed to capital punishment were excluded from the jury).[16]

The petitioner has misread Witherspoon v. Illinois, 391 U.S. 510 (1968), to proscribe only those jury selections where more than one juror was excused on an improperly selective criterion. That reading is not correct. Where even one juror is so excused, over defense objection, the jury was unconstitutionally chosen. Davis v. Georgia, 429 U.S. 122, 123, 97 S.Ct. 399, 400 (1976). See also Wainwright v. Witt, supra. It is clear from the record that the prime factor asserted in the juror's removal was his discomfort with unjust laws. Petitioner does not disagree that such a factor is unconstitutional; he thus cannot escape the necessary legal conclusion by asking this Court to adopt a factor, the juror's purported one time introduction to the judge, which the judge himself called "very weak". Without the unjust laws factor, the juror would not have been excused.

In Wainwright v. Witt, where the cause challenge was sustained by the Supreme Court, defense counsel had not

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[16]The prosecutor had also objected that the juror had once met the judge, but the judge termed this reason "very weak" (85). There was no indication that this juror's impartiality was in any way affected thereby. The judge didn't remember him, and the single meeting had occurred ten years earlier.

objected and the state trial court had expressly sought to go beyond the juror's general opinion on capital punishment to ascertain whether those views would impair her function and on four separate occasions the juror stated that her opinions would interfere with her functions. None of these factors appear in this case.

Aside from the unconstitutional effect of this erroneous exclusion by itself, it was also one more challenge that removed a white juror, and it appears that it was a subterfuge engaged in by the prosecutor to accomplish that purpose without using a peremptory. The prosecutor could not actually have been concerned that this juror would not follow the Court's instructions, because he wanted jurors who would have trouble doing just that.

CONCLUSION

FOR THE REASONS STATED HEREIN,
THE PETITION FOR A WRIT OF CERTIORARI
BEFORE JUDGMENT SHOULD BE DENIED.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -X

MICHAEL ROMAN,

Petitioner,

-against-

ROBERT ABRAMS, Attorney General of the State of New York,

Respondent.

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85 Civ. 0763-CLB

MEMORANDUM AND ORDER

Brieant, J.

On December 4th of last year, breaking with long standing precedent, the Second Circuit, in McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), rehearing en banc den., 756 F.2d 277 (2d Cir. 1985), petition for cert. filed March 4, 1985, 53 U.S.L.W. 3671, "spell[ed] the end of the peremptory challenge as an effective jury selection tool," in state criminal trials (Meskill, J., dissenting). The Court held that: "[T]he Sixth Amendment's guarantee of trial by an impartial jury ... forbids the exercise of [peremptory] challenges to excuse jurors solely on the basis of their racial affiliation." 750 F.2d at 1131. It also turned the jury selection process into a possibility of twenty mini- trials within a Class A felony trial in New York, as the court deter- mines whether the prosecutor's "reasons" for exercising peremptories are "genuine" or merely "pretextual". Id. at 1132. Defendants, because their exercise of peremptory challenges are not "state action," and because a "reason" to challenge a juror which originates with the client

APPENDIX A

will be a privileged communication, will be subject to no such mini-trial. The inequality produced thereby must lead to abolition or severe reduction of peremptories. We discuss McCray and its predecessors more fully infra p. 15. In the meantime, we consider how the rule of McCray is to be applied to this white petitioner.

Petitioner Michael Roman, a white person, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Roman challenges his conviction in the New York State Supreme Court, Bronx County first, on the ground that he was deprived of his Sixth Amendment right to a trial before a fair and impartial jury comprised of a cross-section of the community, due to the prosecutor's use of his peremptory challenges to exclude white venirepersons solely because of their race. He also makes the customary assertion that he was denied his Sixth Amendment right to effective assistance of counsel. This latter contention need not detain us; counsel so maligned had the foresight to anticipate McCray almost three years before it came down.

Prior Proceedings

On December 18, 1981, petitioner was convicted by a jury in Supreme Court, Bronx County, along with his co-defendant, Harold Schreiber, of conspiracy in the fourth degree, arising out of an arson-for-hire agreement. Petitioner appealed his conviction and on December 8, 1984, the Appellate Division, First Department, affirmed without opinion. See People v. Roman, ____ A.D.2d ____, 484 N.Y.S.2d 389 (1st

Dept., Dec. 6, 1984). Petitioner then sought leave to appeal to the Court of Appeals of the State of New York. That application was denied on January 28, 1985. In his state appeals, petitioner raised the contentions presented here. See Ex. 1 to Answering Affidavit of Allen H. Saperstein (sworn to February, 1985). Since these federal claims were both fairly presented to the state courts, defendant has exhausted his state court remedies as required by 28 U.S.C. § 2254. See Daye v. Attorney General of State of New York, 696 F.2d 186, 192-94 (2d Cir. 1982). Having exhausted his appeals at the state level, petitioner filed his petition in this Court on January 29, 1985, proceeding by order to show cause. The execution of petitioner's judgment of conviction was stayed pending consideration of the petition, he was enlarged or continued on his existing state bail, and an evidentiary hearing was held before me on the jury selection claim. [1/] Decision was reserved. Set forth below are the findings of fact and conclusions of law of this Court following its evidentiary hearing.

The Trial

The prosecution's chief witness was one Ernest Brooks, a Black man with a criminal record. Mr. Brooks had been arrested on July 3, 1980 on a charge of burglary. He negotiated with the prosecutor in exchange for leniency on his burglary charge, to furnish information concerning his participation in an ongoing conspiracy to blow up a building in the Bronx. According to Mr. Brooks, the explosion was to

take place the following day at the Hunts Point Taxi Exchange, a building owned by Harold Schreiber at which petitioner was employed.

On July 4, 1980, and on three other occasions in July, Brooks, acting as an undercover equipped with a tape recorder, engaged petitioner Michael Roman in several conversations. [2/] Brooks testified at length at trial, both on direct and cross-examination, as to his activities and concerning the context in which the taped conversations had taken place. During the trial, only one and part of another of the taped conversations were introduced by the prosecution for consideration by the jury. Although many of the words on tape are apparently unintelligible (see Ex. 4A, Tr. of July 15, 1980 tape), there are words spoken by Roman on July 15, 1980 which could support the inference that he did intend that the building be destroyed. He was heard discussing a procedure to be effected on the roof of the Taxi Exchange, to block the vents, in order that a gas explosion in the building might be enhanced.

In addition to the tape recording and Brooks' testimony as to the details of the conspiracy, the prosecution presented other witnesses who testified as to Schreiber's financial difficulties, (Trial Tr. at 981-83), that Schreiber had obtained recent increases in the insurance coverage for the building (Trial Tr. at 864-65, 867-70), and that the alleged scheme to blow up the building was feasible. (E.g., Trial Tr. at 837-38, 911-12, 914, 922-24, 926).

The evidence at trial, including Brooks' testimony, was sufficient to support a conviction, notwithstanding evidence or argument submitted by the defense that talk of the conspiracy was just a "joke." (Trial Tr. at 1146).

Violation of Petitioner's Right to an Impartial Jury

We consider first whether petitioner was denied his right to a fair trial as guaranteed by the Sixth Amendment to the United States Constitution, made applicable to the states since 1968 through the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145 (1968).

During the jury selection process, both counsel for the defendants complained vociferously to the trial judge that the prosecutor was deliberately utilizing his peremptory challenges to exclude whites from the panel of proposed jurors in order to obtain a petit jury comprised of as many minority panel members as possible. Petitioner through his trial counsel claimed, and now claims, that these actions on the part of the prosecutor to exclude white jurors deprived him, as a Caucasian, of his right to a jury trial before an impartial jury comprised of a fair cross-section of the relevant community. We consider first the jury selection procedures as revealed from the trial transcript itself.

The challenges were exercised in rounds, the prosecutor acting first, all in conformity with New York Criminal Proc. Law § 270.15.

because it was a Class C felony case, each side was entitled to fifteen peremptory challenges. New York Crim. Proc. Law § 270.25.

Round 1

On August 17, 1981, a panel of twelve potential jurors was drawn at random from a panel of venirepersons and seated as follows:

Juror No. 1	Bertha Hammons	
No. 2	Yvonne Bumpers	
No. 3	Emma Cauldwell	
No. 4	Jay Heager	*
No. 5	Richard Harnz	*
No. 6	Carmen Valez	
No. 7	Olga Velacquez	
No. 8	Tina Martinez	*
No. 9	Camille Viscargllio	*
No. 10	Isabelle Martin	*
No. 11	Lindrina Rosario	*
No. 12	Robert Theodore	

(Voir Dire at 13). [3/]

After extensive questioning of the panel by both the trial court and counsel, giving rise to no challenges for cause, counsel were each given their opportunity to exercise peremptory challenges. The prosecutor challenged six persons peremptorily. They were panel members Nos. 4, 5, 8, 9, 10 and 11, indicated by an asterisk, above.

Defense counsel raised an immediate objection, pointing out clearly to the trial court that the prosecutor had exercised these six challenges so as to exclude every white juror then seated. (Voir Dire Tr. at 51-52). The prosecutor responded lamely that only four of his

challenges were against white jurors, and that the other two challenged were Hispanic. (Id. at 52). Defense counsel continued this high level discourse by observing that the two Hispanics were "light-skinned." It is clear from colloquy in the record that no white jurors remained in the box at the conclusion of the prosecutor's peremptory challenges in Round 1. (Id.). After defense counsel, acting jointly as required by local practice, had exercised four peremptory challenges, the two remaining panel members, Yvonne Bumpers and Carmen Valez, were seated as jurors Nos. one and two. (Id. at 54). As such, each was immune from further peremptory challenges. It is clear from the context of the trial record that neither of these two jurors was white, and I so find.

Round 2

A group of ten replacements was drawn from the venire and seated in the jury box for further questioning by counsel, as follows:

Juror No. 3	Doreen Williams	
No. 4	Bernard Ryan (Harry Therber)	*
No. 5	Haddie Barnharm	*
No. 6	Edith Hicks (John Cullan)	*
No. 7	Alice Carlson	
No. 8	Richard Davis	
No. 9	Margaret Green	
No. 10	Willie Hill	
No. 11	Julius Tesler	
No. 12	Marie Hines (Elice Roy)	

(Voir Dire at 54-61). [4/]

After voir dire examination, the prosecutor exercised three more peremptory challenges, excluding panel members Nos. 4, 5 and 6.

(Id. at 66). Two of these three persons were also white. (Id. at 67). Defense counsel both objected to this action. (Id. at 66-67). Only one white juror remained in the box after the prosecutor's challenges in the second round.

Defense counsel then exercised three joint peremptory challenges of their own, excusing one juror who was white. Defense counsel felt compelled to state that his reason for excluding the only remaining white juror was that the person was "illiterate." (Id. at 67-68). However, his action was not state action, and there is no evidence of bad faith on his part, assuming that it matters. Again, at the conclusion of the second round of challenges, the prosecutor had used nine of his fifteen permitted challenges, at least six of which had been used to exclude white persons from the panel. The defense had used seven of their fifteen joint challenges, only one of which was exercised against a white juror. At the end of this round, then, six jurors had been seated permanently; none of whom was white.

Round 3

The remaining six seats were then filled. After further questioning, and the dismissal of one juror for cause, the prosecutor challenged one of the six and defense counsel excused two others. It may be inferred from the lack of objection by defense counsel, and by certain unchallenged comments of the prosecutor on the record, that all three peremptory challenges on this round were lodged against black

jurors. (See id. at 77, 101). Apparently, of the nine individuals seated permanently as jurors at the conclusion of this round, two were white, and I so find. (Id. at 100).

Round 4

Three replacement jurors were seated. One of the three was excused on the prosecutor's challenge for cause, and defense counsel peremptorily excused the remaining two, both of whom were black. (Id. at 85, 88).

Round 5

Three prospective jurors were again seated in the jury box. Two of these jurors were excused on consent and their seats were filled. Then, after one of the three new prospective jurors was excused for cause, defense counsel exercised their peremptory challenges against the remaining two prospective jurors, one of whom was white. This left three vacant seats. (Id. at 89-93). Only two white jurors remained seated as jurors.

Round 6

The three remaining seats were filled once again. The prosecutor challenged two of the three jurors peremptorily, both challenges being exercised against white persons. (Id. at 100). When defense

counsel again pointed out to the trial court that the prosecutor was continuing to exclude white persons from the panel, the trial judge invited the prosecutor to place his reasons for exercising the two challenges on the record. (Id.). That invitation soon turned into a direct request by the court for the prosecutor to state his reasons. (Id. at 103).

Rather than comply fully with the trial court's request, the prosecutor withdrew one of his challenges. As to the other juror, his comment was "I don't feel she can be fair and impartial to my witnesses." (Id.). No further reason of any kind was proffered. Defense counsel exercised no challenges. Due to the withdrawal by the prosecutor of one of his peremptory challenges on this round, three white jurors then remained on the panel.

Round 7

The last remaining seat on the jury was filled, and once again the prosecutor exercised a peremptory challenge. (Id. at 136). Defense counsel again voiced an objection. At the request of defense counsel, and after some prodding by the court, the prosecutor stated his "reason" for the challenge: "I believe based on his background." (Id. at 138). The juror so excused was white.

Round 8

No peremptory challenges were exercised by either side in this final round, so the twelfth juror was thus sworn and selection of the regular panel was complete. Two alternate jurors were then selected and, neither being challenged, jury selection was concluded.

Discussion

Aside from challenges for cause, which we assume to have been proper for purposes of this petition, the prosecutor challenged peremptorily a total of eleven prospective jurors, eight of whom were white, two others said to be "light-skinned" Hispanic individuals, to be regarded as white for our present purposes, and one black. An additional challenge had been exercised against a white juror, but was withdrawn when the court required the prosecutor to state his reasons for the challenge. 5/ Aside from the alternates, then, the final jury panel consisted of three white persons and nine jurors who were perceived to be black or dark-skinned Hispanic.

Petitioner asserts, and I conclude in light of McCray, that the pattern of challenges exercised by the prosecutor at trial was sufficient to make out a prima facie case to the effect that the challenges had been exercised deliberately to exclude potential white jurors solely because of their race. Under McCray, this imposes a burden on

the prosecutor to come forward and present "some reason other than group affiliation for the challenges." McCray, 750 F.2d at 1133.

The state judiciary has refused to require the prosecutor to give reasons. See People v. McCray, 57 N.Y.2d 542, 547 (1982). The trial court attempted unsuccessfully to get the prosecutor in this case to do so. To the extent the prosecutor did respond at all to the trial judge, his comments were most revealing. In Round 6, as to one challenge, the admission was made by the prosecutor that he believed that the white juror could not be fair to my witnesses. (Voir Dire Tr. at p. 103). No reason for this belief was given, nor does one appear from the record. The principal witness for the prosecution was a black person who was characterized later at the federal habeas hearing by the prosecutor (Tr. at 56), as "not very bright," who had an "extensive [criminal] record," "plainly he was a commercial burglar" with "20 or 30" burglary arrests, and "violent enough not to have people even listen to who he is" (id. at 57). This is a plain admission by the prosecutor of an invidious, racially motivated exercise of at least one peremptory in Round 6. As to the other such peremptory exercise in that Round, rather than verbalize a reason, the prosecutor withdrew his challenge of a white juror, in the tradition of the child whose fingers had been caught in the cookie jar.

The "reasons" given at the federal habeas hearing were likewise childish and pretextual, as well as unbelievable. The prosecutor testified at the federal habeas hearing before me. I do not say that he

wilfully perjured himself in 1985 with respect to his motivations and subjective thinking at the voir dire conducted in 1981. However, he in effect concedes, and I find, that due to the passage of time, he has no present recollection of what his thinking was then. His contemporaneous courtroom notes have been preserved, but he cannot now read much of his own writing, and neither can this Court. Moreover, even were we able to decipher those notes, their relevance is nil in light of the prosecutor's testimony at the habeas hearing that he does not know now whether the various individual juror attributes listed on these partly legible notes necessarily caused him to decide to challenge or to refrain from challenging a particular juror. (Habeas Tr. at 87-89). At the federal habeas hearing, he has tried, with great effort, using the transcript of the voir dire proceedings at trial, and that portion of the courtroom notes which he can now decipher, to reconstruct his reasoning in 1981. This great effort has led to a lot of lawyer circumlocution, folklore and cant, either unbelievably trivial and incredible, or pointing most strongly to the inescapable inference that the prosecution set out to skew the jury selection process so as to remove as many white jurors as possible in direct contravention of the proscriptions set forth in McCray, supra. For example: He excused Hager (Heager), in Round 1, he now says, because he knew one of the defense counsel, but no attempt was made to challenge for cause. He now says he excused Hahn (Harnz) in Round 1 because he was employed in "electronics," which was a "too technical background for the type of juror I wanted in this case." (Voir Dire at 43). Such a claim has a hollow ring; this commercial

arson trial involved testimony about the financial condition of Schreiber and the placement of new insurance, as bearing on motive.

The third juror challenged in Round 1 was Isabel Martin. During the course of the habeas hearing the witness stated that he could not recall his reason for challenging this white juror. (Tr. at 45). And, a fourth juror challenged by the prosecution was employed as a bookkeeper. In addition this person had a nephew who was employed as a police officer. (Id. at 45). Three years later the prosecutor states that he challenged the juror on the ground that she was a bookkeeper and would therefore have difficulty accepting the reasonable doubt standard. (Id.). For further justification of this challenge, the prosecutor volunteered that the relationship of the juror to a police officer also bore upon his decision:

> "Ordinarily while a prosecutor may want someone who is connected to the police in some way, in this case due to the type of informant I had, who had a very extensive record, I felt that people who were too law and order oriented could not accept the type of complainant or informant that I was going to base my case on." (Id. at 45-46).

Considering the fact that two jurors who were later empanelled also were relatives of police officers, I find the witness' assertion to be intentionally misleading, and the product of selective recollection of the sort where the wish is father to the thought.

Having had the opportunity to observe this witness' demeanor in court and finding inconsistencies throughout his testimony, not only

in the above-cited instances, but in various others as well, I find that the reasons given now, three years after the fact, for exercising peremptory challenges cannot be accepted as correct and are pretextual. The prosecutor had the opportunity to give reasons for the challenges at the time of trial. Having foregone that opportunity, the inference that his challenges were racially motivated is quite strong, especially where, as here, out of eleven challenged jurors, ten are white.

More than once, at the trial and in the federal habeas corpus hearing, Roman's prosecutor in effect conceded that at least some of his challenges were racially motivated. Verbalizing those challenges as intended to obtain jurors with whom the credibility of the prosecution's black accomplice witness would be enhanced, as he did (Habeas Tr. 55-57), describes the doughnut without mentioning the hole that goes with the doughnut; such discriminatory selections diminish the rights of the defendant to a representative jury at the final stage of the selection process, as granted in McCray.

Based on the entire record before me I am convinced and find that the prosecutor used his peremptory challenges deliberately, insofar as possible, to effect the invidious purpose of eliminating or reducing the number or proportion of white jurors who would try Roman's case. We now consider the impermissibility of these actions in light of McCray.

Any discussion of use by a prosecutor of peremptory challenges to exclude potential jurors from sitting on a particular petit jury,

based on factors such as race, religion, national origin, membership in a "cognizable group" or other stereotype, must begin with the case of Swain v. Alabama, 380 U.S. 202 (1965), in order that the newly announced rule of McCray may be placed in a proper context.

In Swain, a black petitioner, convicted in Alabama of rape and sentenced to death after trial by a jury composed entirely of white persons, challenged his conviction because the prosecutor exercised his peremptory challenges so as to exclude the only six available black venirepersons from the petit jury. His pleadings relied on a claimed violation of the Equal Protection Clause of the Fourteenth Amendment. 6/ At the time, the Supreme Court had not yet discovered that the Sixth Amendment was applicable to the states, announced three years later in Duncan v. Louisiana, 391 U.S. 145 (1968). In Swain, the Court upheld a system of using peremptory challenges, "without cause, without explanation and without judicial scrutiny," id. at 212-13, similar to that used in McCray's state trial and that of our petitioner. The Court accepted the contention of Alabama that its system of striking jurors, "whether they be Negroes, Catholics, accountants or those with blue eyes," was "a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial." Id. at 212. The Swain Court traced the history of the peremptory challenge to English common law, where it was the "persistent ... view that a proper jury trial required peremptories on both sides," id. at 212-13, and noted that the practice of permitting both sides peremptory challenges continued when the courts of this nation were first formed, with both the

federal and state systems sharing the view that such challenges were an effective means of obtaining a fair and impartial jury. Id. at 214-18.

As stated earlier, Swain was decided in the context of a traditional Equal Protection challenge. Even in the face of such a constitutional challenge, the Swain Court recognized the overriding importance of the peremptory challenge in all criminal cases:

> "The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. [Citation omitted]. Although '[t]here is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory challenges,' Stilson v. United States, 250 U.S. 583, 586, nonetheless the challenge is 'one of the most important of the rights secured to the accused,' Pointer v. United States, 151 U.S. 396, 408. The denial or impairment of the right is reversible error without a showing of prejudice. [Citations omitted]. 'For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.' [Citations omitted]." 280 U.S. at 219.

The importance of the right to exercise peremptory challenges, was not limited to the defendant:

> "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that 'to perform its high function in the best way 'justice must satisfy the appearance of justice'.' In re Murchison, 349 U.S. 133, 136. Indeed the very availability of peremptories allows counsel to ascertain the possibility of

> bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause. Although historically the incidence of the prosecutor's challenge has differed from that of the accused, the view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' Hayes v. Missouri, 120 U.S. 68, 70." 380 U.S. at 219-20.

This recognition of the right of both the defendant and the prosecutor to exercise the challenge of a limited number of venirepersons without cause was the first step in the Swain Court's rejection of the Equal Protection argument. The second step was to recognize that in the circumstances of any particular case, the reasons for the exercise of such challenges need not be given:

> "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. [Citations omitted]. While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. [Citation omitted]. It is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another' [citations omitted] .... It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. [Footnote omitted]. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. [Footnotes and citations

> omitted]. Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried." 380 U.S. at 220-21.
>
> * * *
>
> "The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes." 380 U.S. at 222.

In concluding, the Swain Court reiterated that no jury in a single case was required by the Constitution to be stricken merely because of the possible use by the prosecutor of his challenges to exclude persons of a particular race. Instead, the presumption that the challenges were based on case-related reasons is overcome only by a showing that "the prosecutor's use of peremptory challenges [occurred] over a period of time." Id. at 227. The McCray court concluded that to demonstrate this was "mission impossible," (subheadnote at 1120).

The Swain Court made it quite clear that nothing in the Constitution required a prosecutor to disclose reasons for his peremptory strikes. After Duncan, in 1968 applied the Sixth Amendment to the states, a long line of authority developed to the effect that Swain is applicable even in a Sixth Amendment context. 7/

No rational person can defend deliberate exclusion of a cognizable group from such an important public duty as that of administering the criminal law. All can agree that a prosecutor so abusing peremptory challenges is at the very least infra dig. and arguably unfair. However, the whole idea of a peremptory challenge is at odds with the necessity to give reasons. The transactional costs involved in litigating whether the reasons are "pretextual" will be vast and the reliability of the results uncertain. In the American tradition of the adversary system of justice it is foreseeable that on occasion the prosecutor will abuse his peremptories, and even more often, the defense will challenge the challenges.

The State of New York, opposing the McCray petition, conceded that the Constitution bars the use by a prosecutor of peremptory challenges to exclude potential jurors solely because of their race. 8/ 750 F.2d at 1116. Nevertheless, the McCray court, seeing the importance of the issue and the lack of agreement among the courts on this question, examined the meaning of Swain and its continued vitality. 750 F.2d at 1118.

The majority in McCray first addressed the issue of whether decisions subsequent to Swain had effectively overruled it. Despite its own obvious dissatisfaction with Swain and criticism from commentators and more recently, from courts, the McCray panel found that the strictures of Swain still remained valid when the analysis is based only on the Equal Protection Clause. 750 F.2d at 1123-24. Still, the majority

in McCray implies that Swain should have been decided differently, in light of the impossibility of showing racially motivated abuse of peremptory challenges in case after case, rather than merely in the case at hand. 9/

The McCray court pointed out that "almost no other defendants in the nearly two decades since the Swain decision have met th[e] standard of proof" required under Swain. Rather than seeing this as evidence that Swain had not resulted in the wholesale exclusion of blacks from petit jury panels, as had originally been feared, see e.g., Comment, Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury, 52 Va.L.Rev. 1157 (1966), the McCray court cited a handful of decisions where there was evidence of discriminatory use of peremptory challenges in a specific case, but no pattern, apparently perceiving those few cases as evidence that the Swain Court had created an insuperable bar to enforcing a conceded right. 750 F.2d at 1120-21.

Commentators have suggested however that the system itself contains an internal sanction against the abuse of peremptory challenges by exercising them in a discriminatory fashion. According to this view, one with which this Court agrees, an attorney would be foolish to waste his not unlimited challenges to exclude persons solely on the basis of race, since this would render him helpless to challenge other jurors who might find it more difficult to accept that attorney's view of the case. This may well be the reason why so few cases have met the Swain test

and, indeed, why relatively few instances of racial discrimination in jury selection have been reported. Saltzburg and Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md.L.Rev. 337, 365 (1982). Furthermore, our Circuit has held in the case of United States v. Newman, 549 F.2d 240 (2d Cir. 1977) that:

> "Blacks are the major victims of wrongdoers and it is unlikely that they hesitate to convict where the case warrants it. All of the members of this court, hearing the present case, have served more than a decade as judges of the United States District Court for the District of Connecticut. It has been our experience that Black persons, summoned and drawn for jury panels in that court, have been excellent jurors and have shown no predilection to favor or harm any group, class or kind of persons but have judged the facts on the evidence presented in court in the light of the court's charge.
>
> The right to peremptory challenges is of great importance, both to the Government and to the defendants--but mostly to the defendants, because they are personally involved in the result of the trial and for this reason usually have more of the peremptory challenges than the Government. These challenges provide one of the most effective assurances that a party will have a fair and impartial jury. If, for example, a defendant knows or has a strong suspicion that a particular venireman is hostile to him or believes the venireman has strong or militant views which would make it unlikely, in spite of the court's instructions, that the venireman would give fair and impartial consideration to the case, and yet the defendant does not have available sufficient evidence to prove these disqualifications on a challenge for cause, he can solve the problem with a peremptory challenge. The same considerations apply to a plaintiff or a prosecutor. Once, however, a plaintiff or prosecutor is required to submit to interrogation concerning his reasons for making a peremptory challenge it will probably not be long before defendants will be required to do likewise. This, in all likelihood, would spell the end of peremptory challenges; and Blacks and

other recognizable minority groups would thereby suffer a major loss in the removal of one of the greatest safeguards the law has provided for a fair trial." 549 F.2d at 250, n. 8.

The McCray court observed that the Supreme Court's statement in Swain that no violation of equal protection can occur because blacks and whites "'are alike subject to being challenged without cause' [citation omitted] ignores practice." 750 F.2d at 1121. "[A]s a practical matter," said the McCray court, "the prosecution does not peremptorily excuse whites simply because they are whites." Id. This case at bar demonstrates that the McCray court's conclusion on this point is unfounded. In sections such as Bronx County, it is just as likely that a prosecutor will attempt to exclude whites from a jury as it is that he or she would attempt to exclude blacks. 10/ And, even in areas where whites are in the majority, a prosecutor, who is so disposed, might very well use his or her challenges to exclude whites solely due to their race in order to obtain a jury panel comprised of as many minority members as possible. This is likely in a case such as an arson-for-profit trial, where the crime itself impinges more heavily on the poor and minorities, a point not lost on the prosecution in this case. See Habeas Tr. pp. 55, 133.

After finding that Swain was deserving of "scathing" criticism, the McCray court yet found that "Swain is clear, direct and unequivocal," on the point that any challenge to the exercise of peremptory challenges in a particular case under the Equal Protection Clause could not be sustained. 750 F.2d at 1120-21, 1124.

According to the Second Circuit panel, however, such treatment of Swain as controlling authority was not required where the claim is raised pursuant to the Sixth Amendment. Instead, because each defendant in a criminal case is entitled to trial by an impartial jury comprised of a group of laypersons "representative of a cross-section of the community," 750 F.2d at 1125 (quoting Williams v. Florida, 399 U.S. 78, 100), and this requirement was made applicable to the states through the Fourteenth Amendment, 750 F.2d at 1124, the Constitution "forbids the exercise of [peremptory] challenges solely on the basis of ... racial affiliation." Id. at 1131.

Pursuant to its holding the McCray court fashioned a test to be applied in all instances where a criminal defendant challenged his conviction on Sixth Amendment grounds based on the prosecutor's alleged use of peremptory challenges to exclude persons from the petit jury panel based solely on their membership in a cognizable group:

> "[I]n order to establish a prima facie violation of his right to the possibility of a fair cross section in the petit jury, the defendant must show that in his case, (1) the group alleged to be excluded is a cognizable group in the community, and (2) there is a substantial likelihood that the challenges leading to this exclusion have been made on the basis of the individual venirepersons' group affiliation rather than because of any indication of a possible inability to decide the case on the basis of the evidence presented.
>
> If the defendant establishes such a prima facie case, 'the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.' [Citations omitted].

> In order to rebut the defendant's showing, the prosecutor need not show a reason rising to the level of cause. There are any number of bases on which a party may believe, not unreasonably, that a prospective juror may have some slight bias that would not support a challenge for cause but that would make excusing him or her desirable. Such reasons, if they appear to be genuine, should be accepted by the court, which will bear the responsibility of assessing the genuineness of the prosecutor's response and of being alert to reasons that are pretextual. [Citations omitted]. If the court determines that the prosecution's presentation is inadequate to rebut the defendant's proof, the court should declare a mistrial and a new jury should be selected from a new panel." 750 F.2d at 1131-32.

Essential to the McCray court's analysis, which invokes the necessity for minitrials on the exercise of prosecution peremptories, were several preliminary findings. As stated earlier, the court had to reject the finding that Swain v. Alabama was applicable in the Sixth Amendment context despite its broad language which expressly proscribes judicial inquiry into a prosecutor's reasons for challenging any prospective juror and its express holding that nothing in the entire "Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." Swain, 380 U.S. at 222. The McCray majority saw itself as able to circumvent the unequivocal language of Swain because it did "not believe" this reference was intended to mean what it says, since Swain had focused on the Equal Protection Clause, not the Sixth Amendment. 750 F.2d at 1124.

This interpretation assumes that when the broad language of Swain was uttered on March 8, 1965 the Supreme Court did not foresee

that less than three years later in Duncan (argued January 17, 1968 and decided May 20, 1968), it would be called upon to find that the "fair trial" requirement of the Sixth Amendment applied to the states through the Fourteenth Amendment. However, by the time Swain was decided, "many of the rights guaranteed by the first eight Amendments to the Constitution ha[d] been held to be protected against state action ... by the Fourteenth Amendment," including most of the other rights secured by the Sixth Amendment. See Duncan v. Louisiana, supra, 391 U.S. at 148, and the cases cited therein in fn. 4-8.

To suppose otherwise, as does the majority in McCray, denigrates the scholarship of those who participated in the majority in Swain. Moreover, the dissent of Justice Goldberg in Swain is illuminating:

> "There is nothing in the Constitution of the United States which requires the State to grant trial by jury so long as the inviolability of the peremptory challenge is secured." 380 U.S. at 244 (Goldberg, J., dissenting) (emphasis added).

Justice Goldberg's comment was sufficient to put the entire Supreme Court on notice that its holding would apply to the Sixth Amendment right to jury trial. That the majority remained firm in its position in the face of such trenchant sarcasm is considerable evidence of the intent of that Court to adhere to its holding even on Sixth Amendment analysis.

In his dissenting opinion in McCray, Judge Meskill, while recognizing that the result reached by the majority was "well intentioned," called it:

> "[U]nworkable and contrary to the law of this and almost every other circuit. Until today's decision, federal appellate case law dealing with the racial makeup of juries was uniform; to establish a violation of the Constitution, the defendant had to prove a systematic exclusion of blacks from petit juries that extended over a number of cases. Absent such a showing, the objective existence or nonexistence of a 'proper' reason for the prosecutor's use of a peremptory challenge was irrelevant because the 'presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court.' Swain v. Alabama, 380 U.S. 202, 222, 85 S.Ct. 824, 837, 13 L.Ed.2d 759 (1965)." 750 F.2d at 1135 (Meskill, J. dissenting) (emphasis in original).

Judge Meskill reminded the majority that Swain was not limited to a Fourteenth Amendment equal protection analysis, but was applicable to challenges based on the Sixth Amendment as well: "[W]e cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." 750 F.2d at 1135, quoting Swain, 380 U.S. at 222 (emphasis in original).

The instant case illustrates clearly the practical considerations addressed by Judge Meskill as militating against the conclusion reached by the McCray majority. The peremptory challenge, he said, was used by each side to "ensure that her client faces a jury that at least will be unbiased and at best will be receptive to her view of the case." Id. at 1137. Exclusion of persons from the petit jury for this purpose

is not invidious discrimination, but a process participated in by both sides. "The result of this adversarial system should be an impartial jury." Id. at 1137. Although the McCray majority might find such a system distasteful, "an attorney has not only a right but an obligation to challenge a prospective juror who may be biased, even if the basis of her belief is a broad generalization, which may not in fact be true." See id. at 1137-38.

In McCray, as in Roman's case, the issue was "whether a prosecutor may use peremptory challenges to exclude individual members of a group because she believes that in that particular case they may be biased in favor of members of the defendant's group." Id. at 1138 (emphasis in original). The dissent continued:

> "A competent prosecutor will only strike a member of the defendant's group in situations where she believes the possibility of that individual having a group bias--even if very small--is greater than the possibility of some other prospective juror having a bias. Where the group based assumption against members of the defendant's group is outweighed by some other assumption, the prosecutor will turn to the other assumptions; for instance, if a black college student is being tried in a draft registration case, the prosecutor may prefer to challenge a white social worker rather than a black veteran. By banning the use of such assumptions, the majority has severely limited the effectiveness of the peremptory challenge." Id. at 1138.

Our preceding discussion of the prosecutor's peremptory challenges in this case brings us clearly within the rule of McCray in both its aspects. McCray not only holds that without proof of actual

bias, a defendant is entitled to a new trial if denied the "fair and undistorted chance" that the possibility that a venire representing a fair cross section of the community will be carried over to the petit jury, and that the Sixth Amendment "simply prohibits the state's systematic elimination of the possibility of such carryover" by its abuse of peremptory challenges, 750 F.2d at 1129, it also holds that the Sixth Amendment "forbids the exercise of [peremptory] challenges to excuse jurors solely on the basis of their racial affiliation." 750 F.2d at 1131.

Before leaving the topic, we note agreement with the condemnation by the Court in McCray of a prosecutor who exercises challenges based solely on his or her own personal bigotry or some perceived stereotype concerning a cognizable group, as opposed to case-related reasoning. The fact that such persons were excused due to glaring and unfounded generalizations based on factors such as race is certainly pernicious without regard to the facts of the case. More pernicious still is to permit an individual, convicted of conspiracy to commit arson by blowing up a building within the City of New York, to overturn his conviction merely due to the invidious actions of a prosecutor in excluding a cognizable group from a petit jury concerning which there is no reason to believe that those trial jurors finally selected were not fair and impartial, simply because white jurors had been systematically excluded. Their verdict should not be rendered void merely because of what the prosecutor did. To do so, and to import a number of minitrials into the jury selection process does a disservice to a system which has

served society well for centuries. Nevertheless, our outcome is bound by McCray.

Claim of Ineffective Assistance of Counsel

Not content with having presented this Court with a case clearly within McCray, petitioner insists on obscuring his good claim by insisting on a second claim, essentially frivolous, phrased in terms of "ineffective assistance of counsel," the usual contention of losers. The ineffective assistance claim, as is so often the case, arises out of a trial tactic concerning the Brooks tapes. There were four such tapes made. The prosecutor played one and part of another to the jury. One of the tapes was held inadmissible by the trial court when offered by defense counsel. (See Trial Tr. at 418-50). This ruling was ostensibly based on the fact that defense counsel attempted to introduce the tape during the prosecution's case. The stated purpose of the offer was to impeach the witness Brooks, by showing there was no conversation on the tape between Brooks and defendant Roman. This fact was stipulated by the prosecutor. Thus, the only remaining purpose of the offer was apparently substantive. It was within the trial judge's discretion to conclude that the problem was not whether the tape could come in, but "when does it come in." (Trial Tr. at 445). Defense counsel did not attempt to introduce the tape of July 4, 1980 into evidence, nor did they offer the balance of another tape played by the prosecutor only in part. (Trial Tr. at 1548).

Petitioner now asserts that the tapes not admitted into evidence were exculpatory and the failure of defense counsel to obtain their admission constituted ineffective assistance of counsel. The argument is that the tapes not played would demonstrate that no conspiracy existed.

A high standard must be met to support an ineffective assistance claim:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland v. Washington, 2 U.S.L.W. 4565 (May 14, 1984). See also United States v. Cronic, 52 U.S.L.W. 4560 (May 14, 1984).

In the context of this case, failure to reoffer the tapes appears to have been a product of a tactical decision which ought not to be tested by hindsight. If wrong, it was not so deficient as to rise to the Strickland standard. Furthermore, it cannot be said with certainty that the omitted tapes are exculpatory. At best, they seem ambiguous. At worst, their introduction might have been damaging. Defense counsel could and did cross-examine Brooks at length, posing several questions pertaining to the contents of tape recordings not played.

In conclusion, the failure of counsel to introduce all the tapes into evidence did not cause such a breakdown in the adversary process as would render the result of trial unreliable. The actions of counsel did not prejudice the defendant in any way, and, even assuming prejudice, counsel's representation was reasonable under the circumstances of this case. See Strickland, supra, at 4573-74.

Conclusion

The foregoing constitutes the findings of fact and conclusions of law of this Court following a hearing. The petition is granted and the writ shall issue unless the state shall re-try petitioner before an impartial, validly selected jury within 120 days following appellate finality. Pending such retrial, petitioner is continued on his existing bail.

Settle a judgment on five (5) days notice.

So Ordered.

Dated: New York, New York
May 15, 1985

CHARLES L. BRIEANT

Charles L. Brieant
U. S. D. J.

FOOTNOTES

1. Although permitted to remain at liberty under the conditions that had been imposed by the state court, petitioner is "in custody" for purposes of 28 U.S.C. § 2254. See McCray v. Abrams, 750 F.2d 1113, 1114, n. 1 (2d Cir. 1984).

2. Brooks testified that he was sure Roman became aware some time after July 15, 1980 that Brooks was recording the conversations. It appeared from one of the tapes that Roman was staring at Brooks during one of the conversations, supposedly looking for the wiring or the tape recorder itself. (Trial Tr. at 456-58).

3. All names listed are spelled as in the trial transcript.

4. The names in parenthesis are those who replaced persons originally called, but dismissed for cause either by request of counsel or sua sponte by the trial court. Although petitioner alleges that at least one juror was improperly challenged for cause, the intervening ruling of the trial court is sufficient to render such challenge irrelevant to the issue of whether the prosecutor was exercising his peremptory challenges to exclude white persons solely because of their race. The grant or denial of a challenge for cause is directed to sound judicial discretion and there is no evidence here of an abuse of such discretion. Accordingly, rulings on such challenges will not be considered for purposes of this petition. (See Voir Dire at 6).

5. Defense counsel together challenged a total of thirteen jurors, two of whom were white and the rest minorities. For reasons noted in the text we regard this fact as irrelevant.

6. "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U. S. Constitution, Amend. XIV, Section 1.

7. Every circuit court dealing with the issue with the exception of the case of McCray v. Abrams, which is discussed in the text, has determined that the strictures of Swain v. Alabama were equally applicable in a case involving the Sixth Amendment. See United States v. Canel, 708 F.2d 894 (3d Cir.), cert. denied, ____ U.S. ____, 104 S.Ct. 165 (1983); United States v. Whitfield, 715 F.2d 145 (4th Cir. 1983); Prejean v. Blackburn, 743 F.2d 1091 (5th Cir. 1984); United States v. Clark, 737 F.2d 679 (7th Cir. 1984); United States v. Childress, 715 F.2d 1313 (8th Cir. 1983) (en banc), cert. denied, ____ U.S. ____, 104 S.Ct. 744 (1984); Weathersby v. Morris, 708 F.2d 1493 (9th Cir. 1983); United States v. Jenkins, 701 F.2d 850 (10th Cir. 1983); United States v. Green, 742 F.2d 609 (11th Cir. 1984); see also United States v. Danzey, 622 F.2d 1065 (2d Cir. 1980) (use of peremptory challenges in any particular case "denies no cognizable right"); United States v. Newman, 549 F.2d 240, 247 (2d Cir. 1977) (exclusion of jurors on the basis of race in case after case is necessary to demonstrate systematic exclusion even where the prosecutors in the case at bar challenged Blacks purposely). Id. at 249). However, several opinions dissenting from the denial of certiorari have been cited as support for the proposition that Swain should not be applied in the Sixth Amendment context. See e.g., Thompson v. United States, ____ U.S. ____, 105 S.Ct. 443 (1985); Williams v. Illinois, ____ U.S. ____, 104 S.Ct. 2364 (1984); Gilliard v. Mississippi, ____ U.S. ____, 104 S.Ct. 40 (1984); McCray v. New York, ____ U.S. ____, 103 S.Ct. 2438 (1983).

Three state courts have avoided application of the holding in Swain by finding discriminatory use of peremptory challenges to be in violation of state constitutional guidelines. State v. Neil, 457 So.2d 481 (Fla. 1984); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499,

cert. denied, 444 U.S. 881 (1979); People v. Wheeler, 22 Cal.3d 258, 148 Cal.kptr. 890, 583 F.2d 748 (1978).

8. This concession by the State concerning such a significant issue as the use of peremptories by the prosecution in criminal trials has been termed by one judge to be "incomprehensible." 750 F.2d at 1135, n. 1 (Meskill, J., dissenting).

9. This conclusion explains the departure of the author of McCray from the earlier opinion in United States v. Danzey, 622 F.2d 1065, 1066 (2d Cir. 1980), in which she joined where it was held:

> "While use of peremptory challenges based on a group bias assumption denies no cognizable legal rights "in any particular case," ... a substantial issue would arise if peremptory challenges were being used consistently to exclude Blacks from service as jurors in general or in a significant category of cases. [Citations omitted]. But no relief is appropriate unless the offending pattern is sufficiently general and pervasive to support a clear inference of motivation or intent to discriminate against a particular racial or ethnic group. See United States v. Newman, 549 F.2d 240, 249-50 (2d Cir. 1977)." (Emphasis added).

10. In Bronx County whites constitute only a plurality of the population; about one-third, according to 1980 census figures. See Habeas Hearing, Ex. 1. Blacks and Hispanics total almost 64 percent. If a panel of sixty venirepersons were selected, assuming one-third or 20 of these persons were white, it would not be difficult for any attorney so disposed, to utilize his or her fifteen peremptory challenges to exclude every white venireperson selected to sit as a prospective petit juror.

[illegible] 763 (CLB)

5/28/85

YOUR HONOR,

The attached Judgment does not make reference to the fact that petitioner is continued on his existing bail pending retrial.

Judgment Clerk

85 Civ.763 (CLB)
JUDGMENT

- against -

ROBERT ABRAMS, Attorney General of the State of New York,

Respondent.

----------X

Petitioner having petitioned this Court for a writ of Habeas Corpus, and upon the papers of Mr. Lawrence Mark Stern Esq., attorney for petitioner, and Allen H. Saperstein Esq., attorney for respondent, and after an evidentiary hearing having been conducted in this Court, and post-hearing memorandum of law having been filed by both Mr. Stern for petitioner and Mr. Saperstein for respondent, and all the materials having been considered, and due deliberation having been had, it is HEREBY ADJUDGED, ORDERED AND DECREED THEREON that the petition is granted and the writ shall issue unless the State shall re-try petitioner before an impartial, validly selected jury within 120 days following appellate finality, and Petitioner is continued on his existing bail arrangements and may file a notice of cross-appeal in forma pauperis

Charles L. Brieant

HON. CHARLES L. BRIEANT
JUDGE, UNITED STATES DISTRICT COURT

DATED: May 28, 1985
New York, New York

ENTERED ON THE DOCKET ON _____.

CERTIFICATE OF SERVICE

I, LAWRENCE MARK STERN, an attorney admitted to practice in this Court, hereby certify that on the 9th day of August, 1985, I caused to be served by first class mail, postage prepaid, one copy of the attached

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

upon the District Attorney of the State of New York, Bronx County, 215 East 161st Street, Bronx, New York 10451, attorney for petitioner, cross-respondent, in this action.

Lawrence M. Stern

LAWRENCE MARK STERN

No. 85-138 (2)

Supreme Court, U.S.
FILED
AUG 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

ROBERT ABRAMS,
Attorney General of the State of New York,
Petitioner,

against

MICHAEL ROMAN,
Respondent.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BEST AVAILABLE COPY

Question Presented

Whether the Sixth and Fourteenth Amendments to the Constitution authorize a Federal court to vacate a state criminal judgment of conviction, pursuant to 28 U.S.C. § 2254, solely upon allegations that the state prosecutor exercised his peremptory challenges to excuse whites from the trial jury where the trial jury which rendered the conviction consisted of three whites, three hispanics, and six blacks.

TABLE OF CONTENTS

	PAGE
Question Presented	1
Jurisdiction	1
Supplemental Reason For Granting the Writ	2
Conclusion	3

TABLE OF AUTHORITIES

PAGE

Cases:

Abrams v. McCray, No. 84-1426, *Petition for Cert.* filed March 4, 1985, 53 U.S.L.J. 3671 2

Batson v. Kentucky, No. 84-6263 *Cert. granted* April 22, 1985 2

McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984) *reh'g en banc denied* 756 F.2d 277 (2d Cir. 1985) 2

No. 85-138

IN THE

Supreme Court of the United States

October Term, 1985

ROBERT ABRAMS,
Attorney General of the State of New York,

Petitioner,

against

MICHAEL ROMAN,

Respondent.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Jurisdiction

This Supplemental Petition for a Writ of Certiorari Before Judgment is submitted pursuant to Supreme Court Rule 22.

Supplemental Reason For Granting the Writ

In addition to the reasons offered in the Petition for a Writ of Certiorari Before Judgment, the Court should also grant the petition because of the fact that the New York City, Kings County, prosecutor who represents the state's interests in *McCray* v. *Abrams*, 750 F.2d 1113 (2d Cir. 1984) *reh'g en banc denied* 756 F.2d 277 (2d Cir. 1985), *cert. pending sub nom. Abrams* v. *McCray* No. 84-1426, has submitted an amicus brief in *Batson* v. *Kentucky*, No. 84-6263 *cert. granted* April 22, 1985, in which she agrees with the defendant on the merits of the underlying constitutional question at issue in both "New York City" cases.

Because the State's position is fundamentally different in this New York City case, the Court should grant the Writ of Certiorari Before Judgment in this case in order to give it the benefit of hearing the contrary views of another large urban prosecutor before it decides the question presented in *Batson* v. *Kentucky*, *supra*. Since the amicus brief will have already expanded the *Batson* facts beyond its record to include a New York City case, and since this case presents a live constitutional controversy with regard to the underlying merits of the Sixth and Fourteenth Amendment questions at issue in the 28 U.S.C. § 2254 petitions in both New York City cases, it would be in everyone's interest for the Court to consider the scope of Federal Habeas review of the instant allegations in the context of a live controversy at the time it considers the contrary view of the *McCray* prosecutor in the course of deciding the question presented in *Batson* v. *Kentucky*.

Conclusion

For the foregoing reasons and for the reasons stated in the Petition docketed on July 22, 1985, the Petition for a Writ of Certiorari Before Judgment should be granted.

Respectfully submitted,

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